Supreme Court, U.S.
FILED
051606 JUN 15 2006
OFFICE OF THE CLERK

No. 05-

IN THE

Supreme Court of the United States

ANR PIPELINE COMPANY, *et al.*,

Petitioners,

v.

LOUISIANA TAX COMMISSION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Louisiana Court of Appeal, First Circuit

PETITION FOR A WRIT OF CERTIORARI

JAMES A. PORTER
1001 Louisiana Street
Houston, TX 70072
(713) 420-7694

LAURENCE E. GARRETT
2 North Nevada Avenue
Colorado Springs, CO 80903
(719) 520-4295

CARTER G. PHILLIPS*
VIRGINIA A. SEITZ
SCOTT J. HEYMAN
LAURA E. JUHNKE
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioners

* Counsel of Record

[Additional Counsel Listed on Inside Cover]

June 15, 2006

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

RECEIVED
JUN 16 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

HILTON S. BELL
JAMES K. IRVIN
ANGELA W. ADOLPH
MILLING BENSON
WOODWARD L.L.P.
909 Poydras Street, Suite 2300
New Orleans, LA 70112
(504) 569-7000

QUESTION PRESENTED

Whether Louisiana violated the interstate pipelines' right under the Due Process Clause to a "clear and certain remedy" for the payment of an unconstitutional tax when Louisiana refused to refund the tax unlawfully collected, and instead, in order to lessen or eliminate the refund, ordered a *de novo* re-valuation of taxpayers' property by 52 local assessors.

PARTIES TO THE PROCEEDING

The parties to this proceeding are petitioners ANR Pipeline Company, UT Offshore Company, L.L.C., High Island Offshore System, L.L.C., Stingray Pipeline Company, Tennessee Gas Pipeline Company, and Southern Natural Gas Company; the Louisiana Tax Commission; Malcolm B. Price, Jr., Chairman of the Louisiana Tax Commission; Russel R. Gaspard, Chairman and Member of the Louisiana Tax Commission; Kenneth P. Naquin, Jr., Member of the Louisiana Tax Commission; and Jewette Farley, Member of the Louisiana Tax Commission.

RULE 29.6 STATEMENT

During the tax years in issue, El Paso Corporation, a publicly traded corporation, was the indirect owner of each of the petitioners. Since the years in issue, El Paso Corporation sold its interest in UT Offshore Company, L.L.C. (which is now indirectly owned by Enbridge Energy Partners, L.P., a publicly traded partnership, of which greater than 10% is owned by Enbridge, Inc., a publicly traded corporation), Stingray Pipeline Company (50% of which is now indirectly owned by Enbridge, Inc., and the other 50% of which is owned by MarkWest Energy Partners, L.P., a publicly traded partnership), and High Island Offshore System, L.L.C. (which is now indirectly owned by Enterprise Product Partners, L.P., a publicly traded partnership). Under the terms of the agreements of sale of the various petitioner pipelines, El Paso Corporation or one or more of its affiliates is entitled to any and all refunds received in this matter.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY AND CONSTITUTIONAL PROVISIONS	2
INTRODUCTION AND SUMMARY	3
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE PETITION	12
I. THE DECISION BELOW CONTRAVENES THIS COURT'S PRECEDENT HOLDING THAT DUE PROCESS REQUIRES A STATE TO PROVIDE A CLEAR AND CERTAIN REMEDY FOR THE COLLECTION OF UNCONSTITUTIONAL TAXES	12
A. The Remedy Prescribed By Louisiana Fails To Comport With Due Process	12
B. The Remedial Process Prescribed Below Is In Substantial Tension With *Allegheny Coal* And Decisions Of Other Courts	16
II. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING	22

TABLE OF CONTENTS—continued

Page

CONCLUSION..... 25

TABLE OF AUTHORITIES

CASES Page

ANR Pipeline Co. v. *Louisiana Tax Comm'n*, 774 So. 2d 1261 (La. Ct. App. 2000), *writ denied*, 790 So. 2d 633 (La. 2001) 9, 10
ANR Pipeline Co. v. *Louisiana Tax Comm'n*, 795 So. 2d 1217 (La. 2001) 9
ANR Pipeline Co. v. *LouisianaTax Comm'n*, 811 So. 2d 876 (La. 2002) 9
ANR Pipeline Co. v. *Louisiana Tax Comm'n*, 815 So. 2d 178 (La. Ct. App. 2002), *reh'g denied*, 2002 La. App. LEXIS 1723 (La. Ct. App. Apr. 26, 2002), *writ granted*, 840 So. 2d 27 (La. 2003), *aff'd and remanded*, 851 So. 2d 1145 (La. 2003)..... 9
ANR Pipeline Co. v. *Louisiana Tax Comm'n*, 822 So. 2d 758 (La. Ct. App. 2002), *reh'g denied*, 2002 La. App. LEXIS 2503 (La. Ct. App. July 30, 2002), *writ denied*, 854 So. 2d 343 (La. 2003) 9
ANR Pipeline Co. v. *Louisiana Tax Comm'n*, 868 So. 2d 950 (La. Ct. App. 2004)..... 9
Allegheny Pittsburgh Coal Co. v. *County Comm'n*, 488 U.S. 336 (1989)..... 13, 19
Brummell v. *Department of Revenue*, No. 3931, 1998 Ore. Tax LEXIS 15 (Or. T.C. Apr. 17, 1998) 21, 22
Cox Broad. Corp. v. *Cohn*, 420 U.S. 469 (1975).... 1
Cumberland Coal Co. v. *Board of Revision*, 284 U.S. 23 (1931)..... 13, 17
Georgia R.R. & Banking Co. v. *Redwine*, 342 U.S. 299 (1952)..... 16
Harper v. *Virginia Dep't of Taxation*, 509 U.S. 86 (1993)..... 13
Helstoski v. *Meanor*, 442 U.S. 500 (1979)..... 1
Hillsborough v. *Cromwell*, 326 U.S. 620 (1946).... 13

TABLE OF AUTHORITIES—continued

Page

Louisville & N. R.R. v. *Louisiana Tax Comm'n*, 498 F. Supp. 418 (M.D. La. 1980) 19
Maryland v. *Louisiana*, 451 U.S. 725 (1981) 24
McKesson Corp. v. *Florida Alcohol & Tobacco Div.*, 496 U.S. 18 (1990) 3, 12, 13, 22, 23
Newsweek, Inc. v. *Florida Dep't of Revenue*, 522 U.S. 442 (1998) 12
North Dakota Pharmacy Bd. v. *Snyder's Stores*, 414 U.S. 156 (1973) 2
Reich v. *Collins*, 513 U.S. 106 (1994) 4, 12, 13, 15, 23
Sioux City Bridge Co. v. *Dakota County*, 260 U.S. 441 (1923) 13
Southwestern Bell Mobile Sys., Inc. v. *Arkansas Pub. Serv. Comm'n*, 40 S.W.3d 838 (Ark. Ct. App. 2001) 20, 21, 22
Willamette Indus., Inc. v. *Tennessee Assessment Appeals Comm'n*, 11 S.W.3d 142 (Tenn. Ct. App. 1999) 21, 23

CONSTITUTION AND STATUTES

U.S. Const. art. I, § 8 2
amend. XIV, § 1 2
La. Const. art. VII, § 16 15
art. VII, § 18 ..... 2, 5, 6
15 U.S.C. § 717(a) 24
§ 717 *et seq* 5
28 U.S.C. § 1341 16
49 U.S.C. § 11503 19
La. Rev. Stat. Ann. § 47:1837(D)(2) 2, 7
§ 47:1851 ..... 2, 6, 8
§ 47:1853 ..... 2, 7, 14, 15, 18
§ 47:1856 ..... 2, 13
§ 47:2110(E) 2, 13

TABLE OF AUTHORITIES—continued

RULE Page

Sup. Ct. R. 10(c) 16

ADMINISTRATIVE DECISION

ANR Pipeline Co. v. *Louisiana Tax Comm'n*, Commission Order 05-24-06(A) (La. Tax Comm'n June 1, 2006) 15

OTHER AUTHORITY

Guidelines of Louisiana Tax Commission (2006), *available at* http://www.latax.state.la.us/reg_manuals.htm 7

PETITION FOR A WRIT OF CERTIORARI

Petitioners ANR Pipeline Company, UT Offshore Company, L.L.C., High Island Offshore System, L.L.C., Stingray Pipeline Company, Tennessee Gas Pipeline Company, and Southern Natural Gas Company (collectively, "petitioners" or "interstate pipelines") respectfully petition for a writ of certiorari to review the judgment of the Louisiana Court of Appeal, First District.

OPINIONS BELOW

The judgment of the 19th Judicial District Court, Parish of East Baton Rouge, State of Louisiana and the written reasons for the judgment (Appendix at 36a-54a), were issued on March 30, 2005, and are not reported. The opinion of the Court of Appeal of Louisiana, First Circuit, is reported at 923 So. 2d 81 and included in the Appendix at 1a-35a. The Supreme Court of Louisiana denied a timely Application for Writ of Certiorari on March 17, 2006, in an Order included in the Appendix at 55a.

JURISDICTION

The judgment of the Court of Appeal was entered on September 7, 2005, and the Supreme Court of Louisiana denied the Application for Writ of Certiorari on March 17, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) because the judgment of the Louisiana courts concludes this litigation and finally disposes of petitioners' claims. In addition, the judgment is final because reversal of the State court on the federal issue presented would be preclusive of further administrative proceedings in this matter, see *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 482-83 (1975); because the administrative proceedings contemplated by the court's order themselves deny the federal right petitioners seek to vindicate in this Court, see, *e.g.*, *Helstoski*

v. Meanor, 442 U.S. 500, 506-08 (1979); and because the federal issue was resolved by the State court's judgment and will not survive remand for further administrative proceedings, see *North Dakota Pharmacy Bd.* v. *Snyder's Stores*, 414 U.S. 156, 159-64 (1973).

STATUTORY AND CONSTITUTIONAL PROVISIONS

Article I, Section 8, of the United States Constitution provides, in relevant part, as follows:

> The Congress shall have power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes ...

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in relevant part, as follows:

> [N]or shall any state deprive any person of life, liberty or property, without due process of law . . . .

* * * *

The relevant provisions of the Constitution of Louisiana and the Louisiana Revised Statutes are:

La. Const. art. VII, § 18(A), (B), (D)

La. Rev. Stat. Ann. § 47:1837(D)(2)

La. Rev. Stat. Ann. § 47:1851(K), (M)

La. Rev. Stat. Ann. § 47:1853(B), (D)

La. Rev. Stat. Ann. § 47:1856(E), (F)

La. Rev. Stat. Ann. § 47:2110(E)

These provisions are set forth verbatim in Appendices D and E, at 56a-65a.

INTRODUCTION AND SUMMARY

Louisiana tax law classifies interstate pipeline property as "public service property." As required by law, the Louisiana Tax Commission (the "Commission") assessed petitioners' interstate pipeline property at 25% of its fair market value. In contrast, the Commission treated certain intrastate pipelines as "other property," which local assessors assessed at 15% of fair market value. As State law required, petitioners paid the assessed taxes under protest to the extent that the 25% tax exceeded the tax that would have been due if the 15% rate properly had been applied. The Louisiana courts correctly held that "the Louisiana Tax Commission ... has administered the ad valorem tax scheme in a manner that violates the uniformity requirement of the Louisiana Constitution and a taxpayer's equal protection and due process rights under the Louisiana and United States Constitutions." App. 4a.

As a remedy, the Louisiana courts should have ordered the tax collectors to refund to the interstate pipelines the portion of their taxes unlawfully paid. Indeed, a venerable line of this Court's precedent makes clear that where, as here, the state requires a taxpayer "promptly to pay a tax when due" and then dispute the legality of that tax, the state must provide "meaningful backward-looking relief" and a "clear and certain remedy for any erroneous and unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one." *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 39 (1990) (quoting *Atchison, Topeka & Santa Fe Ry.* v. *O'Connor*, 223 U.S. 280, 285-85 (1912)). This is the quid pro quo to the taxpayer for being forced to litigate tax issues in state court. The Louisiana courts, however, have refused to comply with this established constitutional requirement.

Instead of simply ordering a refund of the unlawfully collected taxes based on the fair market value determined by the Commission, the court remanded this matter to the

Commission with instructions on how to dispose of petitioners' tax claims. The court ordered that petitioners' property be reassessed using the 15% assessment ratio; but, critically, instead of applying that ratio to the fair market value previously determined by the Commission, the court ordered the Commission to return the matter to 52 local tax assessors so that they could redetermine *de novo* and retroactively the fair market value of petitioners' pipeline property during the tax years in question (some dating back twelve years). App. 8a, 53a.

This refusal simply to order a refund, accompanied by a remand for hundreds of untimely retroactive local reassessments under a new methodology for determining the underlying value, is a disturbing attempt to circumvent this Court's requirement that there be a "clear and certain remedy" in the form of a prompt refund. The Louisiana court's command that the property be re-valued by 52 different local assessors to determine a new value for years long ago creates approximately 1,500 new, costly, and time-consuming proceedings.

The "remedy" ordered by the Louisiana courts also violates this Court's prohibition on state efforts to "reconfigure its [remedial] scheme, unfairly, in *mid-course*—to 'bait and switch'" the refund remedy otherwise provided by statute. *Reich* v. *Collins*, 513 U.S. 106, 111 (1994). The interstate pipelines challenged the unconstitutional differential between the percentage at which their property was assessed and the percentage at which the property of *intrastate* pipelines was assessed. The remedy for that unconstitutional tax was to order the lower rate applied to the previously determined fair market value. The State, however, seeks to avoid payment of a full refund by applying the lawful lower 15% rate to newly assessed values. Indeed, a subsequent order of the Commission, see App. 66a-69a, indicates the Commission fully expects that the re-valuation process likely will result in

an *increase* in petitioners' tax liability rather than a refund as required to remedy the constitutional violation.

The decision below contravenes the established jurisprudence of this Court concerning remedies for unconstitutionally collected taxes. Moreover, clearly, if the states may avoid their constitutional obligation to pay refunds by ordering property re-valuations or employing similar tactics, they will have a strong incentive to do so. Unconstitutional taxation of interstate transportation property and the remedies for such taxation are recurring and very important issues that regularly affect these vital industries. For these reasons, the petition should be granted.

STATEMENT OF THE CASE

1. *Background and Relevant Regulatory Provisions.* Petitioners are providers of natural gas transportation, storage, and other services in interstate commerce, and own natural gas pipelines that are located partially in Louisiana. Petitioners' property in Louisiana is subject to ad valorem taxation by the local authorities. In addition, as interstate pipeline operators, petitioners are regulated by the Federal Energy Regulatory Commission ("FERC"), pursuant to the Natural Gas Act, 15 U.S.C. § 717 *et seq.*

The Louisiana Constitution requires property subject to ad valorem taxation to be assessed at a percentage of "fair market value" that "shall be uniform throughout the state on the same class of property." La. Const. art. VII, § 18(A). The State Constitution itself further provides for various classifications of property and the assessment ratios to be applied to each classification. "Public service properties" (excluding land), are assessed at 25% of fair market value, while "[o]ther property" is assessed at 15% of fair market value. *Id.* art. VII, § 18(B). The Commission determines the fair market value of public service properties. *Id.* art. VII, § 18(D). Local assessors determine the fair market value of

all "[o]ther property" subject to taxation within their respective parish or district according to the criteria established by law, which must be applied uniformly throughout the state. *Id.*

The Louisiana statute defines "public service properties" as:

> the immovable, major movable, and other movable property owned or used but not otherwise assessed in this state in the operations of each airline, electric membership corporation, electric power company, express company, gas company, *pipeline company*, railroad company, telegraph company, telephone company and water company. [La. Rev. Stat. Ann. § 47:1851(M) (emphasis supplied).]

"Pipeline company" is further defined as:

> any company that is engaged primarily in the business of transporting oil, natural gas, petroleum products, or other products within, through, into, or from this state, and which is regulated by (1) the Louisiana Public Service Commission, (2) the Interstate Commerce Commission, or (3) the Federal Power Commission, as a "natural gas company" under the Federal Natural Gas Act, 15 U.S.C. §§ 717-717w, because that person is engaged in the transportation of natural gas in interstate commerce, as defined in the Natural Gas Act. [*Id.* § 47:1851(K).]

Interstate pipeline companies are regulated by FERC (the successor to the Federal Power Commission) and are thus defined by Louisiana law as "pipeline companies" and "public service properties." Accordingly, their property is valued by the Commission and assessed at 25% of fair market value.

A number of *intrastate* pipeline companies are regulated by the Louisiana Public Service Commission (the "PSC"). Thus,

they, like *interstate pipelines*, fall within the definition of "pipeline companies." Nevertheless, for a number of years, the Commission intentionally and systematically failed to treat these intrastate pipelines as "public service properties"; instead they were classified as "other property" valued and assessed by the local assessors at 15% of fair market value.[1]

As noted above, "public service properties" and "other property" are both assessed to determine fair market value, but different methods are used for these assessments. For purposes of appraising "public service property," *Id.* § 47:1853(B), the Commission must use the "unit" method to determine fair market value.[2] In contrast, for purposes of determining the fair market value of intrastate pipelines, local assessors rely on replacement cost schedules published by the Commission. See *id.* § 47:1837(D)(2); *Guidelines of Louisiana Tax Commission*, §§ 1301-1307 (2006), *available at* http://www.latax.state.la.us/reg_manuals.htm; see also Trial Tr. at 64 (Jan. 10, 2005) (Test. of Sally Costley, Tax Adviser, El Paso Pipeline Group).

2. *The Instant Case.* For each of the tax years in question, Louisiana law classified and the Commission assessed petitioners as "public service companies." The Commission

---

[1] There are also *intrastate* pipeline companies that are regulated by the Louisiana Department of Natural Resources (the "DNR"). Thus, they do not fall within the statutory definition of "pipeline companies," and are instead "other property" valued by local assessors and assessed at 15% of fair market value.

[2] By statute, under the "unit" method, the Commission is required to proceed as follows:

> (a) Employ all of the following nationally recognized techniques of appraisal, where applicable, to best determine fair market value:
>
> (i) The market approach.
>
> (ii) The cost approach.
>
> (iii) The income approach.
>
> (b) Assign such weight to each approach as is appropriate to best determine fair market value. [La. Rev. Stat. Ann. § 47:1853(B)(1)].

valued petitioners' pipeline properties at fair market value using the statutorily prescribed unit methodology and assessed the properties at 25% of the fair market values so determined.

For the years 1994-2003, petitioners paid under protest that portion of the taxes on the assessed value of their interstate pipelines to the extent the assessment ratio exceeded 15% of the fair market value of the property as determined by the Commission.[3] There is no dispute about the fair market value so determined.[4]

Petitioners perfected their protests by filing suits in Louisiana State court, arguing that the Commission's disparate treatment of interstate and intrastate pipeline property within the same statutorily-defined category of "public service property" violated the uniformity requirement of the Louisiana Constitution, the Equal Protection and Due Process Clauses of the Louisiana and United States Constitutions, and discriminated against interstate commerce in violation of the Commerce Clause of the United States Constitution. Petitioners further alleged that La. Rev. Stat. Ann. § 47:1851(K) facially discriminated against interstate commerce.

Petitioners' trial on the merits was preceded by years of protracted litigation that raised numerous procedural and jurisdictional issues, including, *inter alia*, whether petitioners

---

[3] ANR Pipeline Company paid a portion of its ad valorem taxes under protest for each tax year from 1994-2003. The remaining petitioners paid a portion of their ad valorem taxes under protest for certain tax years between 2000 and 2003. *See* App. 7a n.4.

[4] In their initial protests for one or more of the years in issue, petitioners asserted that the Commission did not properly determine the fair market values of their properties, but *before* the trial in the Trial Court, these claims were all resolved (by stipulation dated December 17, 1999 and finalized by Commission order dated December 21, 1999) or withdrawn (by written notice to the Commission filed March 7, 2001).

could proceed in state trial court seeking a declaratory judgment on constitutional issues without waiting for a final adjudication by the Commission. *ANR Pipeline Co.* v. *Louisiana Tax Comm'n*, 774 So. 2d 1261 (La. Ct. App. 2000), *writ denied*, 790 So. 2d 633 (La. 2001); *ANR Pipeline Co.* v. *Louisiana Tax Comm'n*, 795 So. 2d 1217 (La. 2001); *ANR Pipeline Co.* v. *Louisiana Tax Comm'n*, 811 So. 2d 876 (La. 2002); *ANR Pipeline Co. v. Louisiana Tax Comm'n*, 822 So. 2d 758 (La. Ct. App. 2002), *reh'g denied*, 2002 La. App. LEXIS 2503 (La. Ct. App. July 30, 2002), *writ denied*, 854 So. 2d 343 (La. 2003); *ANR Pipeline Co. v. Louisiana Tax Comm'n*, 815 So. 2d 178 (La. Ct. App. 2002), *reh'g denied*, 2002 La. App. LEXIS 1723 (La. Ct. App. Apr. 26, 2002), *writ granted by* 840 So. 2d 27 (La. 2003), *aff'd & remanded*, 851 So. 2d 1145 (La. 2003); *ANR Pipeline Co. v. Louisiana Tax Comm'n*, 868 So. 2d 950 (La. Ct. App. 2004).

After years of prolonged delay, the trial on the merits of petitioners' claims occurred in January 2005. The trial court held:

> [T]he actions of the Commission in the administration of Louisiana's ad valorem tax scheme, as it pertains to plaintiffs' public service pipelines, have violated the equal protection and due process clauses of the Louisiana and United States Constitutions because of the Commission's disregard of the requirement of uniformity. [App. 53a].[5]

The trial court did not, however, order a prompt refund of the amount petitioners paid under protest. Instead, the court remanded the matter to the Commission with instructions that

---

[5] Having found that the Commission violated petitioners' equal protection rights by treating the favored, PSC-regulated pipelines as "other property" rather than "public service property," the trial court declined to rule on whether the statute facially discriminated against interstate commerce by treating the DNR-regulated pipelines as "other property." App. 47a-48a.

the Commission require the parish assessors to conduct *de novo* retroactive valuations of the petitioners' pipeline properties using the replacement cost schedules applicable to intrastate pipelines and to assess the properties at 15% of the *de novo* valuation amounts. App. 53a.

Petitioners appealed. On appeal, they argued that the court erred by refusing to order a prompt refund of the taxes unconstitutionally collected, and instead ordering the Commission to require local assessors to conduct *de novo* retroactive valuations and assessments of their public service properties. *Inter alia*, petitioners asserted that the court, in order to provide a clear, certain and prompt remedy, was required to order a refund of the difference between the tax paid on an assessment of 25% of fair market value that was determined by the Commission, and the tax that would have been paid on an assessment of 15% of the fair market value so determined.

The Louisiana appellate court affirmed the judgment of the Trial Court, with modifications only to provide that the Commission should order local tax collectors to issue refund determinations, including interest, six months from the date the judgment is final, by directing the local tax collectors to correct the assessments on the tax rolls. See App. 28a-30a, 33a.[6] The court held:

---

[6] It may be possible to conduct the initial re-valuation of all the property at issue within six months, but petitioners will not receive their refunds in six months. The lengthy statutory procedures for review of local assessments, which are described in detail in *ANR Pipeline Co.*, 774 So. 2d at 1263, ensure that there will be a substantial, costly delay. In brief, the following process occurs in each of the 52 parishes in which petitioners have pipeline property: (i) the publication of lists showing assessments for public inspection for 15 days; (ii) the appeal by the complaining taxpayers to the board of review (*i.e.*, the parish governing authority) which, in turn, conducts public hearings on those complaints and makes a decision; (iii) appeal to the Commission; (iv) public hearings on those appeals by the Commission; and (v) appeal to the state district court. *See id.* (citing La. Rev. Stat. Ann. §§ 47:1992, 47:1989, 47:1998).

> the appropriate remedy where the systematic under assessment by state officials of other property in the same class contravenes the constitutional rights of others taxed on the full value and percentage of their property is to employ the same valuation and assessment methodology as that used to assess the preferred properties. This holds true even in the instance, such as the case at hand, where the valuation and assessment methodology employed for the preferred properties is contrary to state law. The ultimate goal is to achieve uniformity and equality. [App. 28a-29a (citation omitted).]

The court rejected petitioners' argument that the reassessment process violated their Due Process rights, noting that the procedural requirements providing for the posting of the assessment lists for public inspection for 15 days, followed by certification of the lists to the board of review, would give the petitioners "ample opportunity to object, if necessary, to the local assessors' valuations." App. 29a.

The Louisiana Supreme Court denied petitioners' petition for a writ of certiorari to the appellate court. App. 55a.

In cases filed by certain of the petitioners addressing the tax period *after* that in issue here, the Commission filed a motion for summary judgment averring, based upon an affidavit of one of its employees, that it had during such subsequent period intentionally failed to assess certain intrastate pipelines that were public service companies at the 25% rate. The Commission thereupon moved that the court declare the Commission violated the petitioners' equal protection and due process rights and order the local assessors to re-value the petitioners' pipeline property using the Commission's

---

Petitioners estimate that there will be three assessments for each parish for each tax year in issue, which would result in approximately 1,500 or more appeals filed with the boards of review and as many further appeals filed with the Commission.

replacement cost schedules and assess the property at 15% of such redetermined value. *See* Reurged Mot. for Partial J. on the Pleadings and Mot. for Summ. J. of the Louisiana Tax Commission, *Tennessee Gas Pipeline Co.* v. *Louisiana Tax Comm'n*, No. 528,554 (19th Jud. Dist. Ct. La. Apr. 10, 2006); Consolidated Mot. for Partial J. on the Pleadings and Mot. for Summ. J. of the Louisiana Tax Commission, *Southern Natural Gas Co.* v. *Louisiana Tax Comm'n*, No. 528,556 (19th Jud. Dist. Ct. La. Sept. 27, 2005).

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONTRAVENES THIS COURT'S PRECEDENT HOLDING THAT DUE PROCESS REQUIRES A STATE TO PROVIDE A CLEAR AND CERTAIN REMEDY FOR THE COLLECTION OF UNCONSTITUTIONAL TAXES.

A. The Remedy Prescribed By Louisiana Fails To Comport With Due Process.

This Court has consistently held that when a taxpayer has paid state taxes declared to be unconstitutional or unlawfully collected, the Due Process Clause of the Fourteenth Amendment requires that state to provide "meaningful backward-looking relief" in the form of a "'clear and certain remedy' ... to ensure that the opportunity to contest the tax is a meaningful one." *McKesson Corp.*, 496 U.S. at 31, 39. See also *Newsweek, Inc.* v. *Florida Dep't of Revenue*, 522 U.S. 442, 445 (1998). Although a state may constitutionally require a taxpayer to contest a tax through a pre-deprivation process, the state may not hold out a post-deprivation remedy and then, after a finding that the tax is unconstitutional, refuse to refund the unconstitutional taxes. See *Reich*, 513 U.S. at 108. Petitioners here utilized Louisiana's post-deprivation remedy by paying the disputed taxes under protest in accordance with the provisions set forth in La. Rev. Stat. Ann.

§§ 47:1856(E), (F), and 47:2110(E), and then filing suits for refund in the Louisiana courts.

A state that has collected an unconstitutionally discriminatory tax must either refund the amounts to the aggrieved taxpayer or assess the tax retroactively against the favored taxpayers. See *McKesson*, 496 U.S. at 31; *Harper* v. *Virginia Dep't of Taxation*, 509 U.S. 86, 88-89 (1993). Where, as here, a state takes no action to raise the taxes of favored taxpayers, this Court has repeatedly held that the aggrieved taxpayer is entitled to a refund based on a reduced assessment. *Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. 441, 446 (1923); *Cumberland Coal Co.* v. *Board of Revision*, 284 U.S. 23, 30 (1931); *Hillsborough* v. *Cromwell*, 326 U.S. 620, 623 (1946); *Allegheny Pittsburgh Coal Co.* v. *County Comm'n*, 488 U.S. 336, 346 (1989).

Moreover, and fundamentally, a state may not "reconfigure its scheme, unfairly, in *mid-course*—to 'bait and switch'" the refund remedy provided by its statute. *Reich*, 513 U.S. at 111. If the state holds out a post-deprivation remedy of refund of unlawfully collected taxes, it must make good on that statutory commitment.

All of these principles were violated by the Louisiana courts in this case. Petitioners sought the standard relief for a collection of an unconstitutional tax—to wit, a refund of the excess of the amount of tax they paid at the 25% assessment ratio over the amount they would have paid had they been assessed at the 15% ratio applied to similarly situated intrastate pipeline properties. Instead of simply ordering a refund, the Louisiana courts created out of whole cloth a "remedial process" that throws petitioners into a maze of uncertainty, delay and litigation, in violation of their due process right to a clear and certain remedy.

As set forth *supra*, under the remedial process invented by the Louisiana courts, petitioners' property must be reassessed, in some cases more than twelve years after the initial

valuations by the Commission, in accordance with *de novo* appraisals in 52 parishes by parish assessors. Moreover, under this process, petitioners' property will be subjected to a valuation method that the uncontested record demonstrates is ill suited to valuing regulated interstate pipelines[7] and that is contrary to Louisiana law, which prohibits the use of replacement cost schedules in valuing public service property for any purpose. See La. Rev. Stat. Ann. § 47:1853(D) ("In no event, however, shall the Louisiana Tax Commission adopt schedules that reflect average life values of the property instead of appraising the individual companies"). Petitioners' appeals of these reassessments will result in over 1,500 costly hearings (one for each assessment) that could take years to reach their ultimate resolution.[8]

Petitioners will be severely prejudiced by such a process as it will be far more difficult and expensive to produce the information necessary to contest an assessment twelve years later, especially since petitioners had no contemporaneous notice that any such information might be required. The injustice is further compounded by the fact that petitioners have already engaged in years of protracted litigation characterized by numerous procedural disputes before the Commission and in Louisiana State courts before receiving any trial on the merits. See *supra* at 8-9. The Louisiana courts' remedy is therefore anything but "clear and certain," and circumvents the mandate of this Court in *McKesson* and its predecessors that a state must provide "meaningful backward-looking relief" to petitioners.

---

[7] In contrast, the Commission's unit method is consistent with "nationally recognized techniques of appraisal" used in the valuation of public utility properties to determine fair market value. La Rev. Stat. Ann. § 47:1853(B)(1).

[8] *See* note 6, *supra*, describing the procedures for review of local assessments.

The remedial process created by the courts below is a classic "bait and switch" of a type proscribed by *Reich*. In *Reich*, the Court held that "what a State may *not* do ... is to reconfigure its scheme, unfairly, in *mid-course*"—*i.e.*, to hold out a postdeprivation remedy, in the form of a tax refund statute, and then declare, only after a taxpayer has paid the disputed taxes, that no such remedy actually exists. 513 U.S. at 111. Clearly, under State law, petitioners would not have contemplated the remedial process inflicted upon them when they paid their unconstitutional taxes under protest. Louisiana law does not authorize re-valuation of property after a tax on that property has been determined to be unconstitutional.[9] The Louisiana courts invented this new remedial process—after finding the tax scheme blatantly discriminatory—to avoid requiring the local tax collectors promptly to pay a full refund to the interstate pipelines. Indeed, a subsequent order of the Commission, see App. 66a-69a, indicates the Commission expects the re-valuation process to result in an *increase* in petitioners' tax liability rather than a refund as required to remedy the constitutional violation.[10]

The unconstitutionality of the remedial process imposed by Louisiana is effectively illustrated by comparing it with those state law remedies that this Court has deemed so inadequate

---

[9] Indeed, Louisiana law requires the Commission to determine the fair market value of public service property under a statutorily-prescribed method, *see* La. Rev. Stat. Ann. § 47:1853(B)(1); and the statute of limitations for challenging the valuations at issue has long since expired, *see* La. Const. art. VII, § 16 (three-year statute of limitations).

[10] *ANR Pipeline Co. v. Louisiana Tax Comm'n*, Commission Order No. 05-24-06(A) (La. Tax Comm'n June 1, 2006) provides in pertinent part: "[T]he Commission hereby instructs the tax collectors that they are not to issue final tax bills . . . based upon reassessment *nor collect any taxes thereon* without the written consent of the Commission or the completion of all appeals challenging the assessment . . . ." App. 68a-69a (emphasis supplied).

that they do not deprive a federal court of jurisdiction under the Tax Injunction Act, 28 U.S.C. § 1341.[11] In *Georgia Railroad & Banking Co.* v. *Redwine*, 342 U.S. 299, 303 (1952), this Court held that a remedy requiring the "filing of over three hundred separate claims in fourteen different counties" is not "plain, speedy and efficient," and therefore that federal jurisdiction was not precluded. Where, as here, a state imposes a remedial process that would be so inadequate that the taxpayer could bypass the state law remedy, surely that remedy cannot constitute a "clear and certain" remedy as required by *McKesson* and its predecessors.

In short, this Court should grant this petition to hold that Louisiana has crafted a remedial process that violates the Due Process Clause as set forth in established precedent of this Court. See Sup. Ct. R. 10(c) (certiorari review is appropriate where a state court of last resort "has decided an important federal question in a way that conflicts with relevant decisions of this Court").

B. The Remedial Process Prescribed Below Is In Substantial Tension With *Allegheny Coal* And Decisions Of Other Courts.

In imposing the remedial process at issue in lieu of ordering refunds, the Louisiana courts attempted to justify the re-valuation by claiming that to craft a constitutional remedy, it was necessary to use a new methodology to determine the underlying value of the interstate pipelines' property. See App. 28a-29a (holding that assessing the taxpayers' property using the same valuation methodology as applied to the preferred intrastate pipelines achieved the "ultimate goal" of "uniformity and equality"). Specifically, the court held that to create a constitutional remedy, the fair market value of the

---

[11] The Tax Injunction Act provides, in relevant part: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341.

interstate pipelines' property should be re-determined using the same methodology as is used to determine the fair market value of intrastate pipelines under State law. This is flatly wrong.

The Louisiana courts purported to cure the unconstitutionality of the State's taxation scheme by equalizing the tax rates and ordering that the same methodology be used to value interstate and intrastate pipelines' property. Far from curing the constitutional violation of discriminatory tax rates, this order not only violated petitioners' constitutional right to a clear and certain remedy, but also perpetuated the discriminatory tax scheme. This Court has made clear that a taxation scheme with facially identical tax rates is nonetheless unconstitutional when those rates are not applied to valuations based on fair market value.

Specifically, in *Cumberland Coal*, 284 U.S. at 29, this Court stated:

> In applying this principle, the fact that a uniform percentage of assigned values is used, cannot be regarded as important, if, in assigning values to which the percentage is applied, a system is deliberately adopted which ignores differences in actual values so that property in the same class as that of the complaining taxpayer is valued at the same figure . . . as the property of other owners which has an actual value admittedly higher. Applying the same ratio to the same assigned values, when actual values differ, creates the same disparity in effect as applying a different ratio to actual values when the latter are the same.

Here, the Commission determined the fair market value of petitioners' interstate pipeline property utilizing the method prescribed by the Louisiana Constitution. The courts, however, ordered re-valuations utilizing a methodology established to determine the fair market value not of interstate pipeline property, but of intrastate pipeline property. See

supra at 9-10. Because interstate pipelines, unlike the intrastate pipelines operating in Louisiana, are rate regulated, the replacement cost schedules the Commission promulgated to value intrastate pipeline property are not designed to determine the fair market value of interstate pipeline property.[12] At the end of the day, therefore, the Louisiana courts have violated petitioners' right to due process and equal protection by denying them a clear and certain remedy and preserving—perhaps even exacerbating—the original unconstitutional tax. Indeed, the Commission has seized on this strategy to perpetuate its discriminatory treatment of interstate pipelines for the period after that in issue herein. See *supra* at 11-12.

In any event, the Louisiana courts cannot hide their discrimination behind a change in valuation methodology. As this Court has held, and numerous other courts have also recognized, the methodology used to determine fair market value has no constitutional significance. The Louisiana court's decision to change methodologies retroactively and to impose an extensive, costly, uncertain remedial process—despite the fact that the change violated Louisiana law requiring valuation of public service properties by the Commission utilizing the unit method, see La. Rev. Stat. Ann. § 47:1853(B)(1)—is a transparent attempt to circumvent the refund requirement and avoid paying a full refund of the unlawfully collected taxes (and even increase petitioners' tax liability).

Under the Louisiana Constitution and Louisiana law, all property, including "public service property" valued by the Commission and "other property" valued by the local

---

[12] *See, e.g.*, Trial Tr. at 26-27 (Jan. 18, 2005) (Test. of Thomas Tegarden, Petitioners' Expert) (testifying that he did not "think it would be appropriate to use [replacement cost tables] on rate regulated compan[ies]" because "replacement cost or reproduction cost doesn't really have anything to do with the earning power of the assets").

assessors, is valued at fair market value, albeit determined by differing methodologies. As this Court has explained, the fact "[t]hat two methods are used to assess property in the same class is, without more, of no constitutional moment." *Allegheny Coal Co.*, 488 U.S. at 343. "[T]he constitutional requirement is the seasonable attainment of a rough equality in tax treatment of similarly situated property owners." *Id.*

Thus, so long as each method is reasonably designed to arrive at the fair market value of the property being valued, there is no requirement that a particular method of computing fair market value be applied to all property. Indeed, in *Louisville & N. R.R.* v. *Louisiana Tax Comm'n*, 498 F. Supp. 418 (M.D. La. 1980), the district court so held in a closely analogous case. There, the court, in accordance with the Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. § 11503 (current version at 49 U.S.C. § 11501) (the "4R Act"), enjoined the Commission from assessing the taxpayer's railroad property (which was classified under State law as public service property assessable at 25% of fair market value) at any rate other than the 15% rate applied to other property.

In that case, the Commission argued that injunctive relief was not appropriate because the 5% discrimination threshold mandated by the 4R Act was not met. Specifically, the Commission contended that the reproduction cost method used for other property resulted in a higher fair market value than the method used by the Commission to value public service property, and therefore that the facial difference in assessment ratios did not necessarily mean that there was discrimination in taxation. The federal court *rejected* this argument. As it explained, "Louisiana proposes to assess rail transportation property at 25 percent of fair market value while it proposes to assess other commercial and industrial property at 15 percent of fair market value. The 5 percent ratio is exceeded no matter how one calculates it." 498 F. Supp. at 422. In other words, the differing assessments

resulted in unconstitutional discrimination, and the fact that two methodologies were used to determine the underlying fair market value of the properties at issue was not relevant to the constitutional violation.

Similarly here, the difference between the assessment rates of 25% and 15% was unconstitutional; the remedy is to refund the difference. It is of no "constitutional moment" that the fair market value of the compared interstate and intrastate properties is determined differently, and certainly no basis for denying petitioners a clear and certain remedy. And, the State's refusal to refund the unlawfully collected taxes and its insistence upon switching the methodologies and then revaluing the underlying property is an unconstitutional attempt to undermine petitioners' due process right to such a remedy. [13]

In accord with this Court's teaching, other states have recognized that the underlying methodology used to determine fair market value is not relevant to the question whether discrimination has occurred or to the issue of what constitutes the appropriate remedy—a refund—once discrimination is found. In *Southwestern Bell Mobile Systems, Inc.* v. *Arkansas Public Service Commission*, 40 S.W.3d 838 (Ark. Ct. App. 2001), the taxpayer argued that its right to equal protection was violated because it was centrally valued and assessed by the Tax Division as a telephone company

---

[13] The Commission below dismissed any analogy to the treatment of the railroad properties on the basis that such treatment was the result of federal preemption. Mem. in Opp. to App. for Writ of Cert. at 4, n.6, No. 2005-C-2372 (La. filed Dec. 6, 2005). The Equal Protection Clause of the United States Constitution effects preemption of state law as much as (or more than) a federal statute. In any event, nothing in the 4R Act requires either central assessment or valuation of railroad property. Thus, the argument that federal preemption distinguishes the achievement of a fair market valuation methodology for railroad properties from the equal protection achievement of a fair market valuation methodology for interstate pipeline properties is without merit.

whereas similarly situated taxpayers, such as paging companies, were valued and assessed by county assessors. The taxpayer claimed that, although a uniform 20% valuation rate was applied by the Tax Division and the county assessors, its assessment would have been lower if it had been valued and assessed by the County assessors.

Citing *Allegheny Coal*, the court rejected the taxpayer's argument, stating, "Given the uniform assessment rate, we can only conclude that, in the absence of any contrary evidence by appellants, any possible difference in assessed values would result from the application of different accounting methods. The use of different accounting methods to assess property in the same class is of no constitutional moment." 40 S.W.3d at 843-44 (citations omitted). See also *Willamette Indus., Inc.* v. *Tennessee Assessment Appeals Comm'n*, 11 S.W.3d 142 (Tenn. Ct. App. 1999) (upholding different valuation methods for timberland property against taxpayer's equal protection challenge); *Brummell* v. *Department of Revenue*, No. 3931, 1998 Ore. Tax LEXIS 15 (Or. T.C. Apr. 17, 1998) (upholding different valuation methods for various residential rental properties against taxpayers' equal protection challenge).

Louisiana's decision to adopt this convoluted remedial process and to make the methodology used to determine fair market values of interstate and intrastate pipeline properties "of constitutional moment" is, therefore, in substantial tension with *Allegheny Coal* and decisions of other courts that the use of more than one methodology designed to determine fair market value is not relevant to the constitutional analysis. The holding below is also inconsistent with Louisiana law which prescribes *differing* methods of valuation for public service properties and other properties, each of which is intended to arrive at the fair market value of the property being valued. This reveals that the remedial process imposed

by the State is nothing more than a ploy to evade the State's constitutional obligation to pay a full, prompt refund.[14]

Accordingly, the petition should also be granted to resolve this tension between the decision below and this Court's instruction, followed by other states, that what is critical for determining and remedying unconstitutionally discriminatory taxation is the tax rate, not the methodology for determining the underlying fair market value of the compared properties.

II. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING.

The legal question presented by the remedial process imposed by the Louisiana courts is important and recurring. As the number of cases decided by this Court reveals, the question of whether a state tax unconstitutionally discriminates arises routinely, meaning that the question of the appropriate remedy also arises routinely. See, *e.g.*, *McKesson*, 496 U.S. at 32-36 (discussing *Atcheson Topeka & Santa Fe Ry.* v. *O'Connor*, 223 U.S. 280 (1912), *Ward* v. *Love County Bd. of Comm'rs*, 253 U.S. 17 (1920), *Carpenter* v. *Shaw*, 280 U.S. 363 (1930), *Montana Nat'l Bank of Billings* v. *Yellowstone Co.*, 276 U.S. 499 (1928), *Iowa-Des Moines Nat'l Bank* v. *Bennett*, 284 U.S. 239 (1931)).

The recent state law decisions discussed *supra* at 20-21 confirm the continuing contentiousness of discriminatory state taxes and the appropriate remedy for such constitutional violations. See *Southwestern Bell Mobile Sys., Inc.* v. *Arkansas Pub. Serv. Comm'n*, 40 S.W. 3d 838 (Ark. Ct. App. 2001); *Brummell* v. *Department of Revenue*, No. 3931, 1998

---

[14] The State has argued that the petitioners are trying to "cherry pick" favorable provisions of Louisiana law, selecting the assessment ratio and method that yield the most advantageous result. Petitioners are not cherry picking but rather seeking to avoid an unlawful, arbitrary and protracted valuation process. In any event, it is the State, not petitioners, that is claiming that one of its own constitutionally-prescribed valuation methods does not achieve fair market value.

Ore. Tax LEXIS 15 (Or. T.C. Apr. 17, 1998); *Willamette Indus., Inc.* v. *Tennessee Assessment Appeals Comm'n*, 11 S.W.3d 142 (Tenn. Ct. App. 1999). Obviously, the fact that the tax falls unfairly on out-of-state entities creates an irresistible political temptation both to impose the tax and to ensure that it is not rapidly redressed by the state. Only steadfast enforcement by this Court on review of state court litigation of taxpayers' due process and other rights requiring fully effective remedies will deter future refusals to adopt and apply tax schemes in accordance with the law.

The tax remedy issues here are important as well as recurring. The states have strong incentives to engage in discriminatory taxation and, if discrimination is found, equally strong incentives to eliminate or minimize the refund that they are required to pay. In the past, states have simply declined to refund the illegally collected taxes, and this Court has made absolutely clear on numerous occasions that such a refusal is unconstitutional. See *McKesson*, 446 U.S. at 31-32; *Reich*, 513 U.S. at 109-10. Louisiana's remedial process is a different way to achieve the same end of reducing or eliminating the refund required after collection of unconstitutional taxes. It is critically important that this Court not allow the states to circumvent this Court's requirement of a clear, certain and prompt remedy in the form of a refund; the states should not be permitted to do indirectly what they are forbidden to do directly.

In addition, the issue is of particular importance in this setting because it involves interstate gas pipeline property, an industry that has significant implications for the national economy. Congress has expressly stated:

> [I]t is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign

> commerce is necessary in the public interest. [15 U.S.C. § 717(a) (the Natural Gas Act)].

See also *Maryland* v. *Louisiana*, 451 U.S. 725, 744 (1981) (exercising jurisdiction to invalidate the State's discriminatory "First-Use Tax" on natural gas because it "implicate[d] serious and important concerns of federalism fully in accord with the purposes and reach of our original jurisdiction"). Especially in this time of rising energy prices, it is vital that the states not be permitted with effective impunity to discriminate against interstate pipelines and burden interstate commerce in this critically important sector of the national economy. Louisiana has erected a gauntlet that few, if any, pipelines will have the resources and stamina to run in order to challenge blatantly unconstitutional taxation schemes, the current remedies for which are thus wholly uncertain, if not illusory. Only review by this Court can halt this inequity.

* * * *

In sum, the remedial process imposed on the interstate pipelines by the Louisiana courts contravenes the legal rules established in this Court's cases, and presents for resolution an important and recurring issue about the lawful remedy for a state's collection of taxes that is unconstitutional. Louisiana has violated petitioners' right to due process by providing a remedy that is not clear, certain, or prompt. The decision of the Louisiana courts should not be left standing to encourage other states to impose similar unconstitutional burdens on taxpayers seeking the refund of unconstitutional tax payments.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES A. PORTER
1001 Louisiana Street
Houston, TX 70072
(713) 420-7694

LAURENCE E. GARRETT
2 North Nevada Avenue
Colorado Springs, CO 80903
(719) 520-4295

HILTON S. BELL
JAMES K. IRVIN
ANGELA W. ADOLPH
MILLING BENSON
WOODWARD L.L.P.
909 Poydras Street, Suite 2300
New Orleans, LA 70112
(504) 569-7000

CARTER G. PHILLIPS*
VIRGINIA A. SEITZ
SCOTT J. HEYMAN
LAURA E. JUHNKE
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioners

* Counsel of Record

June 15, 2006

APPENDIX

APPENDIX A

COURT OF APPEAL OF LOUISIANA,
FIRST CIRCUIT

Nos. 2005 CA 1142 to 2005 CA 1169

ANR PIPELINE COMPANY,

v.

LOUISIANA TAX COMMISSION, MALCOLM B. PRICE, JR., Chairman of the Louisiana Tax Commission, KENNETH P. NAQUIN, JR., Member of the Louisiana Tax Commission, and RUSSEL R. GASPARD, Member of the Louisiana Tax Commission.

ANR PIPELINE COMPANY, STINGRAY PIPELINE COMPANY, L.L.C., UT OFFSHORE SYSTEM, L.L.C., TENNESSEE GAS PIPELINE COMPANY AND SOUTHERN NATURAL GAS COMPANY,

v.

LOUISIANA TAX COMMISSION, MALCOLM B. PRICE, JR., Chairman of the Louisiana Tax Commission, KENNETH P. NAQUIN, JR., Member of the Louisiana Tax Commission, and RUSSEL R. GASPARD, Member of the Louisiana Tax Commission.

STINGRAY PIPELINE COMPANY, L.L.C.

v.

LOUISIANA TAX COMMISSION, MALCOLM B. PRICE, JR., Chairman of the Louisiana Tax Commission, KENNETH P. NAQUIN, JR., Member of the Louisiana Tax Commission, and RUSSEL R. GASPARD, Member of the Louisiana Tax Commission.

UT OFFSHORE SYSTEM, L.L.C.

v.

LOUISIANA TAX COMMISSION, MALCOLM B. PRICE, JR., Chairman of the Louisiana Tax Commission, KENNETH P. NAQUIN, JR., Member of the Louisiana Tax Commission, and RUSSEL R. GASPARD, Member of the Louisiana Tax Commission.

HIGH ISLAND OFFSHORE SYSTEM, L.L.C.

v.

LOUISIANA TAX COMMISSION, MALCOLM B. PRICE, JR., Chairman of the Louisiana Tax Commission, KENNETH P. NAQUIN, JR., Member of the Louisiana Tax Commission, and RUSSEL R. GASPARD, Member of the Louisiana Tax Commission.

TENNESSEE GAS PIPELINE COMPANY,

v.

LOUISIANA TAX COMMISSION, MALCOLM B. PRICE, JR., Chairman of the Louisiana Tax Commission, KENNETH P. NAQUIN, JR., Member of the Louisiana Tax Commission, and RUSSEL R. GASPARD, Member of the Louisiana Tax Commission.

SOUTHERN NATURAL GAS COMPANY,

v.

LOUISIANA TAX COMMISSION, MALCOLM B. PRICE, JR., Chairman of the Louisiana Tax Commission, KENNETH P. NAQUIN, JR., Member of the Louisiana Tax Commission, and RUSSEL R. GASPARD, Member of the Louisiana Tax Commission.

SOUTHERN NATURAL GAS PIPELINE COMPANY,

v.

LOUISIANA TAX COMMISSION, MALCOLM B. PRICE, JR., Chairman of the Louisiana Tax Commission, KENNETH P. NAQUIN, JR., Member of the Louisiana Tax Commission, and RUSSEL R. GASPARD, Member of the Louisiana Tax Commission.

ANR PIPELINE COMPANY, HIGH ISLAND OFFSHORE SYSTEM, L.L.C., TENNESSEE GAS PIPELINE COMPANY, SOUTHERN NATURAL GAS COMPANY, UT OFFSHORE SYSTEM, L.L.C., and MID-LOUISIANA GAS COMPANY,

v.

LOUISIANA TAX COMMISSION, MALCOLM B. PRICE, JR., Chairman of the Louisiana Tax Commission, KENNETH P. NAQUIN, JR., Member of the Louisiana Tax Commission, and RUSSEL R. GASPARD, Member of the Louisiana Tax Commission.

TENNESSEE GAS PIPELINE COMPANY,

v.

LOUISIANA TAX COMMISSION, RUSSEL R. GASPARD, Chairman of the Louisiana Tax Commission, KENNETH P. NAQUIN, JR., Member of the Louisiana Tax Commission, and JEWETTE FARLEY, Member of the Louisiana Tax Commission.

ANR PIPELINE COMPANY,

v.

LOUISIANA TAX COMMISSION, RUSSEL R. GASPARD, Chairman of the Louisiana Tax Commission, KENNETH P. NAQUIN, JR., Member of the Louisiana Tax Commission, and JEWETTE FARLEY, Member of the Louisiana Tax Commission.

SOUTHERN NATURAL GAS COMPANY,

v.

LOUISIANA TAX COMMISSION, RUSSEL R. GASPARD, Chairman of the Louisiana Tax Commission, KENNETH P. NAQUIN, JR., Member of the Louisiana Tax Commission, and JEWETTE FARLEY, Member of the Louisiana Tax Commission.

Sept. 7, 2005

Before: CARTER, C.J., PETTIGREW, and WELCH, JJ.

PETTIGREW, J.

The instant appeal concerns the appropriate remedy upon a determination that the Louisiana Tax Commission (the "Commission") has administered the ad valorem tax scheme in a manner that violates the uniformity requirement of the Louisiana Constitution and a taxpayer's equal protection and due process rights under the Louisiana and United States Constitutions.

FACTS

ANR Pipeline Company, UT Offshore Company, L.L.C., High Island Offshore System, L.L.C., Stingray Pipeline Company, Tennessee Gas Pipeline Company, and Southern Natural Gas Company ("plaintiffs") provide natural gas transportation, storage, and balancing services in Louisiana and in interstate commerce and are regulated by the Federal Energy Regulatory Commission pursuant to the Natural Gas Act, 15 U.S.C. § 717, *et seq.* Plaintiffs each own interstate natural gas transmission pipelines in Louisiana, which properties are classified and taxed as public service properties under La. R.S. 47:1851(K) and (M).[1]

Under the Louisiana Constitution, property is classified and different rates or ratios of fair market value are assigned to

---

[1] The relevant portions of La. R.S. 47:1851 provide as follows:

> K. "Pipeline company" means any company that is engaged primarily in the business of transporting oil, natural gas, petroleum products, or other products within, through, into, or from this state, and which is regulated by (1) the Louisiana Public Service Commission, (2) the Interstate Commerce Commission, or (3) the Federal Power Commission, as a "natural gas company" under the Federal Natural Gas Act, 15 U.S.C. § § 717-717w, because that person is engaged in the transportation of natural gas in interstate commerce, as defined in the Natural Gas Act.
>
> . . . .
>
> M. "Public service properties" means the immovable, major movable, and other movable property owned or used but not otherwise assessed in this state in the operations of each airline, electric membership corporation, electric power company, express company, gas company, pipeline company, railroad company, telegraph company, telephone company and water company. For each barge line, towing company or private car company, only the major movable property owned or used but not otherwise assessed in this state in interstate or interparish operations shall be considered as public service property.

those classifications for ad valorem tax purposes.[2] La. Const. art. VII, § 18(B). The assessed value of "public service properties," excluding land, is twenty-five percent (25%) of the fair market value, while the assessed value of "other property" is fifteen percent (15%) of the fair market value. The assessor determines the fair market value of all property subject to taxation within his respective parish or district, except for public service properties, which are appraised at fair market value and are assessed by the Commission or its successor. La. Const. art. VII, § 18(D). On or before September first of each calendar year, the Commission must allocate the assessed valuation of each public service company among the various local taxing units. La. R.S. 47:1855(A).

During the years 1994 through 2003 ("the tax years at issue"), a number of intrastate natural gas, oil, and other liquid pipeline companies were regulated by the Louisiana Public Service Commission as provided in La. R.S. 30:551(A) and qualified as public service companies under

---

[2] La. Const. art. VII, § 18(B) provides:

(B) Classification. The classifications of property subject to ad valorem taxation and the percentage of fair market value applicable to each classification for the purpose of determining assessed valuation are as follows:

Classifications	Percentages
1. Land	10%
2. Improvements for residential purposes	10%
3. Electric cooperative properties, excluding land	15%
4. Public service properties, excluding land	25%
5. Other property	15%

The legislature may enact laws defining electric cooperative properties and public service properties.

La. R.S. 47:1851(K).[3] The pipelines of these companies, however, were assessed by local assessors at fifteen percent (15%) of fair market value, while the public service properties of plaintiffs were assessed at twenty-five percent (25%) of fair market value.

For each tax year in question, plaintiffs paid their ad valorem taxes under protest.[4] Specifically, plaintiffs challenged that portion of taxes assessed in excess of fifteen percent (15%) of fair market value. Plaintiffs then filed twenty-eight individual suits for declaratory judgment and for refunds of the taxes paid under protest. Plaintiffs argued that the assessed values of their properties were calculated at twenty-five percent (25%) of fair market value, while the assessed values of other pipeline public service taxpayers that fall within the statutory definition of pipeline companies were calculated at fifteen percent (15%) of fair market value. Plaintiffs asserted that this disparate treatment violates the uniformity requirement of the Louisiana Constitution, the equal protection and due process clauses of the Louisiana and United States Constitutions, and the commerce clause of the

---

[3] At trial, Vergie Booty, Director of Public Utility and Audits for the Commission, testified that the Commission did not appraise and assess the properties of Acadian Gas Pipeline Company, Louisiana Intrastate Gas Company, Cypress Gas Pipeline, Tuscaloosa Pipeline Company, Bridgeline, CLE, Harvest Pipeline, Atchafalaya Pipeline, Plains Marketing, Unocal, XPLOR Energy, Union Texas Petroleum Pipeline, Bayou City Pipeline, and Araxas Exploration during the years 1994 through 2003.

[4] ANR Pipeline Company paid a portion of its ad valorem taxes under protest for each tax year from 1994 through 2003; Tennessee Gas Pipeline Company and Southern Natural Gas Company paid a portion of their ad valorem taxes under protest for each tax year from 2000 through 2003; High Island Offshore System, L.L.C., paid a portion of its ad valorem taxes under protest for each tax year from 2000 through 2002; UT Offshore System, L.L.C., paid a portion of its ad valorem taxes under protest for each tax year for 2000 and 2001; and Stingray Pipeline Company, L.L.C. paid a portion of its ad valorem taxes under protest for 2000.

United States Constitution.[5] Also, plaintiffs alleged that La. R.S. 47:1851(K) is unconstitutional. These suits were consolidated for trial.

ACTION OF THE TRIAL COURT

These consolidated cases came before the trial court for a bench trial on January 10, 2005 through January 12, 2005, and concluded on January 18, 2005. Following trial and the submission of post trial briefs by the parties, the matter was taken under advisement. On March 30, 2005, the trial court issued written reasons and a written judgment rendering declaratory judgment in favor of the plaintiffs and finding that the actions of the Commission in the administration of Louisiana's ad valorem tax scheme, as it pertains to plaintiffs' public service pipelines, violated the equal protection and due process clauses of the Louisiana and United States Constitutions. The trial court pretermitted decision on the constitutionality of La. R.S. 47:1851(K) and (M) and remanded the matter to the Commission with instructions that the Commission require the parish assessors to assess the public service pipelines of the plaintiffs for each of the years at issue and calculate taxes based on fifteen percent (15%) of those assessments. The trial court further ordered the Commission to issue plaintiffs a full refund, plus interest, of the difference between the amounts paid for each year and the reassessed amount no later than September 20, 2005.

On April 14, 2005, plaintiffs filed a motion seeking a suspensive appeal, and on April 19, 2005, obtained an order to suspensively appeal the March 30, 2005 judgment. On appeal, the plaintiffs argue that the trial court erred in ordering the Commission to require local assessors to conduct a *de novo* valuation and assessment of public service properties, failing to address plaintiffs' commerce clause chal-

---

[5] Named as defendants in each of the actions were the Commission, the Chairman of the Commission, and its two other members.

lenges, and ordering a refund from the Commission, rather than from the affected taxing jurisdictions. On June 7, 2005, the Commission filed an answer to the appeal, praying that the judgment appealed from be modified to extend the deadline for completion of reassessment to six months following the resolution of this appeal and to recognize that the Commission's duty to issue refunds is to be accomplished in the context of the statutory provisions governing modification of tax rolls. The Commission also made a demand for damages for frivolous appeal pursuant to La.Code Civ. P. art. 2164.

ISSUES PRESENTED FOR REVIEW

In connection with their appeal in this matter, plaintiffs present the following issues for consideration by this court:

1. Upon finding that Louisiana's ad valorem taxation scheme had been administered by the Commission in a manner that violated the uniformity requirement of the Louisiana Constitution and Appellants' equal protection and due process rights under the Louisiana and United States Constitutions because Appellants' public service property was assessed at 25% of fair market value and the public service property of a number of pipelines was assessed at 15% of fair market value, the trial court ordered the case remanded to the Commission with instructions that refunds be based upon *de novo* assessments to be performed by local assessors who, by statute, have no jurisdiction, and lack the expertise and experience, to assess the property of public service companies.

    a. Did the trial court lack jurisdiction to "remand" the case to the Commission, the defendant in this case, before which the case had never been pending, having been brought originally in the district court?

b. Did the trial court lack jurisdiction to order *de novo* assessments when the determinations of the fair market values of Appellants' public service properties were final and never challenged by Appellants, the Commission, or local assessors?

c. Do the local assessors lack jurisdiction to assess *de novo* the property of public service companies such as interstate natural gas pipeline companies?

2. Once the Commission has determined the fair market value of public service property for ad valorem tax assessment purposes, and that value has not been challenged by the taxpayer, can an arbitrary amount be fixed for purposes of calculating a tax refund?

3. When a taxpayer's rights to uniformity and equal protection of the law have been violated by the taxation of its property at a higher assessment ratio than the ratio applied to the property of similarly situated taxpayers,

   a. Is a refund calculated by application of the lower assessment ratio to the fair market value of taxpayer's property the appropriate remedy?

   b. If so, does *de novo* assessment of the taxpayer's property post-judgment destroy the appropriateness of that remedy?

4. Will the remedy ordered by the trial court create a new violation of Appellants' rights to uniformity of taxation and equal protection of the laws?

5. Can property be appraised at fair market value for ad valorem tax purposes, and, years later, be assessed on a different value standard for tax refund purposes, or is fair market value the only standard by which all property must be measured for all tax purposes?

6. When the Commission determines the fair market value of public service property for ad valorem tax purposes

and the assessment ratio to be applied to that value is the subject of subsequent litigation between the taxpayer and the Commission, during which fair market value is never disputed, do principles of res judicata and estoppel bar any judicial or administrative alteration of that fair market value?

7. In a suit for refund of ad valorem taxes paid under protest, in which the court enters judgment that the assessments were levied in violation of the state and federal constitutions, but, as a remedy, the court orders reappraisals of Appellants' public service property by local assessors, who have neither the jurisdiction, authority, nor the expertise, to value that property, and such reappraisals, which are not authorized by statute, for which there are no established procedures or standards, which may result in the unilateral fixing of values by local assessors, or may result in hundreds of administrative hearings before parish authorities and further litigation over values that have long been determined by the Commission, have not been questioned by anyone, and are therefore final, does the trial court's order provide meaningful post-deprivation relief?

8. Do a trial court's findings of violations of a state constitutional requirement of uniformity and state and federal constitutional requirements of equal protection and due process of law make it unnecessary for the court to address Appellants' claim of a violation of the federal Constitution's commerce clause?

9. Is the federal commerce clause violated when ad valorem assessment ratios on interstate pipeline property clearly exceed the rates on intrastate pipeline property that is similar in nature and is indisputably in competition with the interstate pipelines?

LEGAL PRECEPTS [6]

The issues presented by the plaintiffs on appeal involve questions of law. Specifically, plaintiffs aver that the remedy ordered by the trial court violates La. R.S. 47:1853 and La. R.S. 47:1856. Questions of law, such as the proper interpretation of a statute; are reviewed by this court under the *de novo* standard of review. *La. Mun. Ass'n v. State*, 2004-0227, p. 35 (La.1/19/05), 893 So.2d 809, 836. When a trial court commits an error of law, the reviewing court is not subject to the manifest error standard and can make an independent determination of the facts from the record on appeal. *Arabie Bros. Trucking Co. v. Gautreaux*, 2003-0120, p. 7 (La.App. 1 Cir. 8/4/04), 880 So.2d 932, 938, *writ denied*, 2004-2481 (La.12/10/04), 888 So.2d 846.

DISCUSSION AND ANALYSIS

Remand to the Tax Commission

In the instant appeal, plaintiffs argue that the trial court exceeded its jurisdiction by remanding the matter to the Commission for *de novo* assessments of plaintiffs' public service properties by local assessors. Rather, plaintiffs argue that the trial court was required to accept the final fair market values of the properties, as determined by the Commission, to multiply such values by an assessment ratio of fifteen percent (15%) to arrive at the new assessed valuations, and to order the refunds based on such amounts. In support of this argument, plaintiffs noted that these cases were filed as actions under the original jurisdiction of the trial court—not as actions seeking review of administrative rulings of the Commis-

---

[6] It should be noted that the Commission has argued in its responsive brief to plaintiffs' appeal that this matter involves the calculation of damages and the decision of the trial court should not be disturbed on appeal absent abuse of discretion. However, we find that this appeal involves the interpretation of Louisiana law on ad valorem taxation, and therefore, is subject to a *de novo* standard of review.

sion. To the extent that the trial court "remanded" the matter to the Commission, the plaintiffs contend that this is procedurally inappropriate.

The plaintiffs argue that the Louisiana Supreme Court has previously determined that the state district court has original jurisdiction in these consolidated cases. In *ANR Pipeline Co. v. La. Tax Comm'n*, 2002-1479 (La.7/2/03), 851 So.2d 1145, ("ANR IV"), the Louisiana Supreme Court granted certiorari, following this court's reversal of a judgment sustaining the Commission's exception raising the objection of prematurity, to consider whether original jurisdiction over plaintiffs' constitutional challenges lies with the Commission or with Louisiana district courts. Therein, the Commission argued that the requirements of La. R.S. 47:1856(D)(1) deprive the district courts of original jurisdiction over any matter related to the correctness or legality, including constitutionality, of a public service property tax assessment. The *ANR IV* court explained, however, that the Commission's argument was compromised by the fact that the Commission was without subject matter jurisdiction to consider the constitutional issues presented.

> The fact that the Legislature has granted the [Commission] general authority to hear "all objections" does not, and cannot, give the [Commission] subject matter jurisdiction over constitutional questions, as the [Commission] concedes. With few exceptions, Louisiana district courts have original jurisdiction over all civil and criminal matters. Moreover, "administrative agencies lack the power to hold statutory provisions unconstitutional." It is the district court that has original jurisdiction to rule on the constitutionality of statutes. Accordingly, in addition to the rule established by *Triangle Marine* [, *Inc. v. Savoie*, 95-2873 (La.10/15/96), 681 So.2d 937] allowing non-public service property taxpayers to file protests based on legality challenges directly in district

> court, we now hold that all taxpayers, including public service property taxpayers, may file protests based on constitutional challenges directly in district court.

ANR IV, 2002-1479 at 9, 851 So.2d at 1151 (citations omitted). Accordingly, the court held that the plaintiffs' protest to tax the assessments based solely on constitutional challenges was not prematurely filed in trial court, even though the Commission had not issued a final determination of assessed valuation.

Also, plaintiffs rely on La. R.S. 47:1856(F)(1), which sets forth the remedy available if the trial court determines that the assessed valuation is less than the amount set by the Commission. The statute provides:

> F. (1)(a)(i) If the assessed valuation finally determined by the court is less than the amount determined by the Louisiana Tax Commission, the company shall be entitled to a credit against future property taxes in each jurisdiction affected or a refund in cash from each jurisdiction affected. Such credit shall be deducted by the Louisiana Tax Commission from the assessment of the year subsequent to any final determination. If a company chooses a refund, that refund shall be paid by the tax collector of each affected jurisdiction no later than March thirty-first of the year subsequent to any final determination. Interest shall be credited at the minimum rate as provided in R.S. 39:1217.1 or, if escrowed by the governing authority, at the actual rate earned on the money paid under protest in the escrow account during the period from the date such funds were received by the governing authority to the date of such refund.

Plaintiffs argue that this statute requires the trial court to review and determine the assessed valuation of the properties at issue, and does not expressly authorize or direct the trial court to remand the matter to the Commission or local tax

assessors for reassessment. Accordingly, plaintiffs submit that the remedy provided by the trial court is contrary to law.

In opposition to the appeal, the Commission argues that this court made it clear in pre-trial proceedings that remand is both necessary and appropriate. In support, the Commission cites the ruling of this court in *ANR Pipeline Co. v. La. Tax Comm'n*, 2001-2594 (La.App. 1 Cir. 2/23/04), 868 So.2d 950, ("*ANR V*"). In *ANR V*, this court considered on remand the Commission's exception raising the objection of no cause of action relative to the viability of an action against the Commission for the recovery of taxes. Specifically, the Commission asserted that it did not possess the statutory authority to order a nonparty tax collector to refund any purported taxes; therefore, it argued that no cause of action had been asserted by the plaintiffs. In finding that the local tax collectors were not necessary party defendants to the plaintiffs' suits, this court reasoned:

> ANR avers that the statutory requirement that the [Commission] be named as defendant does not preclude the concomitant legislative requirement to name the tax collectors for the sought after remedy of a refund. We disagree. *The authority and duty to supervise and regulate the assessments of local property taxes and public service properties clearly fall under the aegis of the [Commission]. The [Commission] remains statutorily imbued with the power to ascertain uniformity or lack of uniformity with constitutional or statutory requirements for each parish in the state. In the absence of conformity of assessments, the [Commission] is mandated to order the assessor to reappraise properties.* Consistently, at the time of ANR's petitions to the court, La. R.S. 47:2110 E provided: "Any taxpayer in the state who has paid his taxes under protest as provided herein and who has filed suit under the provisions of R.S. 1856 . . . shall cause to issue in said suit notice for the collection of said

> taxes in the parish or parishes where the property is located . . . ." The [Commission] does not dispute that ANR properly issued said suit notices to the tax collectors in each of the individual lawsuits under review.
>
> This suit challenged the constitutional solidity of taxation by the [Commission]. Given ANR's adherence to the statutory requirements at the time that the causes of actions were asserted, this court deems the naming of the [Commission] as the defendant to state a cause of action and potential remedy against the [Commission].

ANR V, 2001-2594 at 8, 868 So.2d at 955 (emphasis added) (citation and footnote omitted). Based on this rationale, the *ANR V* court reversed the judgment of the trial court, which granted the defendant's exception raising the objection of no cause of action, and remanded the matter to the trial court for consideration.

In light of the entire procedural history of these consolidated cases, the plaintiffs' argument appears somewhat misguided. In *ANR IV*, the Louisiana Supreme Court held that the trial court has original jurisdiction over constitutional challenges. It is widely recognized that challenges to the correctness of assessments, however, are properly decided by the Commission. *Triangle Marine, Inc. v. Savoie*, 95-2873, p. 4 (La.10/15/96), 681 So.2d 937, 939; *ANR Pipeline Co. v. La. Tax Comm'n*, 2000-2251, p. 5 (La.App. 1 Cir. 12/22/00), 774 So.2d 1261, 1264, *writ denied*, 2001-0250 (La.4/20/01), 790 So.2d 633 ("*ANR I*"). Indeed, in *ANR V*, this court indicated that the matter would be remanded to the Commission if, after trial on the merits, it were determined that the taxation was unconstitutional. Accordingly, plaintiffs have erroneously cited *ANR IV* for the proposition that the Commission is without authority to undertake and/or order reassessment of the properties at issue following remand by the trial court. Additionally, La. R.S. 47:1856(F)(1) merely provides the procedure for refund or credit in the event the Commission

erroneously assesses public service properties. The statute does not divest the Commission of authority to reassess the properties once suit is filed in trial court.

In fact, Louisiana courts have often remanded matters to the Commission upon determination that the assessment is improper. In *Kansas City S. Ry. Co. v. La. Tax Comm'n*, 95-2319 (La.App. 1 Cir. 6/28/96), 676 So.2d 812, the plaintiff railroad challenged the Commission's ad valorem property tax assessment.[7] In its system valuation of plaintiff, a Class II railroad, the Commission used the market, cost, and income approaches of appraisal, and weighted the cost approach at ten percent (10%), the income approach at twenty percent (20%), and the market approach at seventy percent (70%). In determining the fair market value of Class I railroads, by contrast, the Commission did not use the market approach, instead choosing to use only the income and cost approaches. Plaintiff filed suit, alleging that the differing methods of appraisal violated Article VII, § 18 of the Louisiana Constitution and La. R.S. 47:1853.[8] The trial court affirmed the final assessment by the Commission. On appeal, this court

---

[7] Pursuant to La. R.S. 47:1851(M), public service properties include the immovable, major movable, and other movable property owned or used but not otherwise assessed in this state in the operations of each railroad company.

[8] Louisiana Revised Statutes 47:1853(B)(1) provides as follows:

> B. (1) In appraising public service properties, the Louisiana Tax Commission shall:
>
> (a) Employ all of the following nationally recognized techniques of appraisal, where applicable, to best determine fair market value:
>
> (i) The market approach.
>
> (ii) The cost approach.
>
> (iii) The income approach.
>
> (b) Assign such weight to each approach as is appropriate to best determine fair market value.

held that the assessment of the plaintiff's property violated the uniformity requirements of the Louisiana Constitution and La. R.S. 47:1853 and the equal protection clause of the Fourteenth Amendment to the United States Constitution. Based on this finding, this court reversed in part the decision of the Commission, as affirmed by the trial court, and remanded the matter to the Commission for reassessment of plaintiff's 1993 ad valorem tax assessment.

Likewise, in *MidLouisiana Rail Corp. v. La. Tax Comm'n*, 588 So.2d 1163 (La.App. 1 Cir.1991), *writ denied*, 594 So.2d 895 (La.1992), plaintiffs, MidLouisiana Rail Corporation and MidSouth Rail Corporation, both subsidiaries of MidSouth Corporation, appealed from a trial court judgment affirming the 1988 tax assessments to plaintiffs' corporations by the Commission. MidSouth Rail contended that the 1988 assessment of its company reflected an increase of two hundred fifty-seven percent (257%) from the Commission's assessment of the same property in 1986, while owned by another company. Similarly, MidLouisiana contended that the 1988 assessment of its property reflected an increase of one hundred thirty-three percent (133%) from the Commission's assessment of the property in 1987, while under different ownership. Plaintiffs alleged that these increases in their assessments occurred during a period when the Commission either reduced or held constant the assessments of property owned by other Louisiana railroads. On appeal, this court found that the Commission did not comply with the provisions of La. R.S. 47:1853(B) in determining the fair market value of the railroad properties and that the assessments were in violation of Article VII, § 18(D) of the Louisiana Constitution. Accordingly, the matter was remanded to the Commission for a re-determination of the fair market value and assessment of the properties in accordance with law.

Under the law and jurisprudence, we find that the trial court was correct in remanding this matter to the Commis-

sion. On remand, it is within the province and authority of the Commission to correct errors in appraisal and/or assessment of public service properties. La. R.S. 47:1837.

Effect of Fair Market Value Determination by the Commission

Plaintiffs argue that the Commission's determination of the fair market value of plaintiffs' public service properties is final and binding. Plaintiffs point out that a public service taxpayer, who is dissatisfied with the initial determination of fair market value assigned by the Commission, may file a protest with the Commission within thirty days after receipt of the initial determination. La. R.S. 47:1856(A)(2). On appeal, plaintiffs aver that they did not protest the Commission's determination of the fair market values of their public service properties. Rather, plaintiffs argue that they challenged the ratio applied to fair market value in calculating plaintiffs' ad valorem taxes. Accordingly, plaintiffs submit that the values are not subject to modification by the trial court.

Plaintiffs cite the doctrine of *res judicata* in support of the argument that the Commission's determination of fair market value should not be disturbed. Pursuant to La. R.S. 13:4231, a final judgment is conclusive between the parties and bars litigation of subject matter arising from the same transaction or occurrence raised by a prior suit.[9] Citing *Humphrey v.*

---

[9] Louisiana Revised Statutes 13:4231 provides as follows:

Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent:

(1) If the judgment is in favor of the plaintiff, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and merged in the judgment.

(2) If the judgment is in favor of the defendant, all causes of action existing at the time of final judgment arising out of the

Robertson, 97-1742 (La.App. 4 Cir. 3/11/98), 709 So.2d 333, plaintiffs argue that this principle also applies to determinations of administrative agencies not challenged on judicial review.[10]

In addition, the plaintiffs aver that the doctrines of equitable estoppel and/or judicial confession prevent the Commission from challenging its determination of the fair market values of the properties at issue. Specifically, plaintiffs point out that the Commission admitted at trial that the fair market values were correct.[11]

In opposition, the Commission submits that plaintiffs challenged the valuations because the petitions in the consolidated actions request that the Commission's determinations of assessed value of plaintiffs' public service properties be declared null and void. Accordingly, the Commission alleges that the plaintiffs are in bad faith to argue that the doctrines of *res judicata* and estoppel are applicable in this case.

---

transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action.

(3) A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment.

[10] In *Humphrey*, the fourth circuit court of appeal considered whether determinations of an administrative agency can serve as the basis of an objection of *res judicata* where no appeal has been taken. In that case, the court reasoned that the doctrine should be narrowly applied to those instances where the agency has acted in a quasi-judicial capacity and where the parties have been given proper notice and ample opportunity to be heard. *Humphrey*, 97-1742 at pp. 3-4, 709 So.2d at 335.

[11] Vergie Booty, Director of Public Utility and Audits for the Commission, testified that the Commission appraised the plaintiffs' properties at fair market value for each of the tax years at issue.

In this case, the plaintiffs filed protests with the Commission and filed the instant suit seeking refund of taxes paid under protest. The plaintiffs cannot now argue, therefore, that the doctrines of *res judicata* and collateral estoppel preclude reassessment of the properties at issue, including reappraisal, particularly when it is necessary to satisfy the uniformity requirements of the Louisiana Constitution and the equal protection requirements of both the Louisiana and United States Constitutions.

Appropriateness of the Remedy Ordered by the Trial Court

The plaintiffs argue that the trial court erred in ordering a refund of the difference between the amounts paid under protest and the amounts based on reappraisals of the properties, because it is contrary to law and results in disparate treatment.

With respect to the contention that the trial court created a remedy that is unsupported by law, plaintiffs cite Article VII, § 18(D) of the Louisiana Constitution, which provides that each assessor determines the fair market value of all property subject to taxation within his respective parish or district, except public service properties, which are valued at fair market value by the Commission or its successor. To the extent that there is no constitutional, statutory or other legal basis for permitting local assessors to assess public service properties, the plaintiffs allege that the trial court erred in remanding the matter to the Commission with instructions that the Commission require the parish assessors to assess the public service properties of the plaintiffs for each of the years at issue.

Likewise, plaintiffs submit that the remedy ordered by the trial court violates La. R.S. 47:1853(D), which prohibits the adoption by the Commission of average life values of public service properties in lieu of appraisal of the individual companies. Local assessors rely on replacement cost schedules to

value intrastate pipelines. Plaintiffs contend that replacement cost schedules place the same value on all property, regardless of the type of property (i.e. rate regulated v. non-rate regulated), zoning restrictions, and government regulation, while fair market value cannot exceed the amount upon which the property is capable of earning as an acceptable rate of return. Accordingly, plaintiffs aver that the use of replacement cost schedules by local assessors to determine the valuation of plaintiffs' public service properties would violate the statute.

Moreover, the plaintiffs submit that the trial court's judgment would result in disparate treatment since it would subject them to a valuation method different from that used to value other interstate natural gas pipeline companies in violation of La. R.S. 47:1853(B)(2).[12] Since a different valuation method governs locally assessed pipelines, subjecting plaintiffs to those valuation methods, while all other interstate natural gas pipelines are valued by the Commission, will clearly result in the use of different valuation methodologies for taxpayers in the same class. Plaintiffs contend that the use of differing methodologies constitutes a violation of the uniformity requirements of the Louisiana Constitution and the equal protection requirements of the Louisiana and United States Constitutions.

Lastly, plaintiffs argue that the remedy ordered by the trial court violates their due process rights. Plaintiffs contend that upon remand for *de novo* assessment, the local assessors would be strongly motivated to arrive at higher valuations

---

[12] Louisiana Revised Statutes 47:1853(B)(2) provides:

> (2) However, all public service properties of the same nature and kind shall be appraised in the same manner. The appraised value of all lands owned by the company in this state shall be deducted from the total appraised value of the public service properties and shall be assessed by the Louisiana Tax Commission and shown as a separate item on the tax roll.

than those set by the Commission so as to reduce or eliminate the refunds due. Plaintiffs argue that this is unjust because there is no meaningful opportunity to challenge the outcome of the local assessor's valuations at this stage in the proceedings. Additionally, plaintiffs argue that due process requires a refund where they reasonably relied on the post-deprivation refund procedure provided by Article VII, § 3(A) of the Louisiana Constitution[13] and La. R.S. 47:1856. Plaintiffs argue that the only refund that would provide adequate relief is a full refund of all taxes paid under protest.

In opposition, the Commission argues that the plaintiffs on appeal are asking that they be valued as public service properties but assessed as "other property" at fifteen percent (15%) of fair market value. In this sense, the Commission has alleged that the plaintiffs are attempting to "game the system" by having the lower fair market valuation resulting from classification as public service property coupled with the lower assessment ratio of fifteen percent (15%) applied to nonpublic service properties. Based upon the testimony presented at trial, the Commission avers that the unit method of valuation used to value public service properties yields different values than the local assessor's determination of cost replacement. Accordingly, the Commission submits that the plaintiffs err in arguing that they would have paid $29,933,602.54 less in property taxes (based on the assumption that the correct assessed value for the plaintiffs was $44,900,403.81) had they been taxed on the same basis as the preferred companies. Rather, the Commission avers that it is impossible to determine the difference between the taxes paid by plaintiffs and the proper amount of taxes absent reappraisal.

---

[13] Article VII, § 3 of the Louisiana Constitution provides as follows:

(A) The legislature shall prohibit the issuance of process to restrain the collection of any tax. It shall provide a complete and adequate remedy for the prompt recovery of an illegal tax paid by a taxpayer.

Interestingly, both the plaintiffs and the Commission base their arguments in part on *Sioux City Bridge Co. v. Dakota County, Neb.*, 260 U.S. 441, 43 S.Ct. 190, 67 L.Ed. 340 (1923), and the subsequent line of cases. In *Sioux City Bridge Co.*, the Supreme Court considered the appropriate remedy where the systematic under-valuation by state officials of other property in the same class contravenes the constitutional rights of one taxed on the full value of his property. In that case, the plaintiff bridge company complained that the state of Nebraska, through its duly constituted agents (namely, the county assessor and the county board of equalization), improperly executed the Constitution and taxing laws of the state and intentionally and arbitrarily assessed the plaintiff's property at one hundred percent (100%) of its true value in accordance with state law and all other real estate and its improvements in the county at fifty-five percent (55%). The Nebraska Supreme Court held that when property is assessed at its true value and other property in the district is assessed below its true value, the proper remedy is to have the property assessed below its true value raised, rather than to have property assessed at its true value reduced. On writ of certiorari, the United States Supreme Court reversed and remanded, finding as follows:

> [S]uch a result as that reached by the Supreme Court of Nebraska is to deny the injured taxpayer any remedy at all because it is utterly impossible for him by any judicial proceeding to secure an increase in the assessment of the great mass of underassessed property in the taxing district. *This court holds that the right of the taxpayer whose property alone is taxed at 100 per cent. of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of the statute. The conclusion is based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by*

> *law, the latter requirement is to be preferred as the just and ultimate purpose of the law.* In substance and effect the decision of the Nebraska Supreme Court in this case upholds the violation of the Fourteenth Amendment to the injury of the Bridge Company. We must, therefore, reverse its judgment.

Sioux City Bridge Co., 260 U.S. at 446-447, 43 S.Ct. at 192 (emphasis added). Since the Nebraska Supreme Court did not make a clear finding on the issue of discrimination, the case was remanded to that court for further hearing.

Similarly, in *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County, W.Va.*, 488 U.S. 336, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989), the tax assessor for Webster County, West Virginia, valued the plaintiffs' real property from 1975 to 1986 on the basis of its recent purchase price, while other properties not recently conveyed were assessed based on their previous assessments with minor modifications. Each year, the county commission affirmed the assessments, and plaintiffs appealed to the state circuit court. Eventually, a number of these cases were consolidated for consideration. The state circuit court reduced the assessed valuation and ordered the commission to reduce the assessments to the levels recorded in the guidelines issued by the state tax commissioner. The West Virginia Supreme Court of Appeals reversed and remanded, finding that the only remedy available to plaintiffs was an effort to have the assessments on neighboring properties raised. On certiorari, the United States Supreme Court held that the assessments violated the equal protection clause of the Fourteenth Amendment to the United States Constitution. Further, the Supreme Court held that the plaintiffs could not be remitted to the remedy specified by the West Virginia Supreme Court of Appeals:

> A taxpayer in this situation may not be remitted by the State to the remedy of seeking to have the assessments of the undervalued property raised. "The [Equal Pro-

> tection Clause] is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class."

Allegheny Pittsburgh Coal Co., 488 U.S. at 346, 109 S.Ct. at 639 (citations omitted). Accordingly, the judgment of the West Virginia Supreme Court of Appeals was reversed and the case was remanded.

In *Cumberland Coal Co. v. Bd. of Revision of Tax Assessments in Greene County, Pa.*, 284 U.S. 23, 52 S.Ct. 48, 76 L.Ed. 146 (1931), the plaintiffs alleged that the valuation placed upon their coal was unjust and discriminatory as the commissioners had assessed all coal in the same township at the same valuation, regardless of the remoteness or accessibility of the said coal to market cost of operation, means of transportation, or difference in value and without due regard to the valuation and assessment of other coal and other classes of real estate in the county. On writ of certiorari, the United States Supreme Court reversed the judgment of the Pennsylvania Supreme Court, which found that the plan of assessment in those cases did not violate the equal protection clause of the Fourteenth Amendment to the United States Constitution. The Court reasoned as follows:

> [T]he fact that a uniform percentage of assigned values is used, cannot be regarded as important, if, in assigning the values to which the percentage is applied, a system is deliberately adopted which ignores differences in actual values so that property in the same class as that of the complaining taxpayer is valued at the same figure (according to the unit of valuation, as, for example, an acre) as the property of other owners which has an actual value admittedly higher. Applying the same ratio to the same assigned values, when the actual values differ, creates the same disparity in effect as applying a dif-

> ferent ratio to actual values when the latter are the same. If the commissioners, in the instant case, had taken the basis of 100 per cent., instead of 50 per cent. of the assigned values, but had adopted the same method of assessment by which all the coal in a township (aside from active coal) was assessed at the same value an acre, despite well-known and important differences in value, the result would have been an undervaluation of similar coal belonging to other owners, which would have brought the case of the petitioners within the principle of the decisions cited. In such case, if the petitioners' property had been valued at 100 per cent. of its actual value, the like property of the other owners, having a higher actual value, would in effect have been valued at less than 100 per cent. The discrimination is essentially the same, and is equally repugnant to the constitutional right, when both assessments are made on the basis of 50 per cent. of assigned values and differences in actual values are deliberately and systematically disregarded.

Cumberland Coal Co., 284 U.S. at 29-30, 52 S.Ct. at 50-51. Accordingly, the Court found that the plaintiffs were entitled to a readjustment of the assessments of their coal so as to put these assessments upon a basis of equality, with due regard to differences in actual value, with other assessments of the coal of the same class within the tax district.

Louisiana courts have followed the precedent of the federal courts in upholding equality in the assessment of ad valorem taxes. In *Bussie v. Long*, 286 So.2d 689 (La.App. 1 Cir.1973), *writ refused*, 288 So.2d 354 (La.1974), taxpayers brought an action to require the Commission to assess all property in the state at actual cash value for ad valorem tax purposes. On remand from the Louisiana Supreme Court, the trial court rendered judgment mandating compliance by the Commission with laws requiring assessment at actual cash value, and the Commission appealed. On appeal, this court

held that notwithstanding the repeal of the statewide ad valorem tax, the Commission had the obligation of assessing property for taxation for local tax purposes, of supervising and directing assessments required to be submitted to the Commission by local assessors, and of fixing actual cash value of property within the state. This court reasoned:

> It is settled that a taxpayer is entitled to have his property taxed at that percentage of value applicable to others equally and similarly situated, even though statutory law may provide otherwise. The rule is based on the principle that if both the standard of true value and the uniformity and equality required by law cannot be achieved, equality and uniformity is preferred under the law.

Bussie, 286 So.2d at 700 (citation omitted). Under this rationale, this court affirmed the decision of the lower court.

In the case at hand, it is undisputed that certain interstate pipeline companies were being taxed as if they were not public service pipelines in that they were valued by local assessors at depreciated replacement cost and assessed at fifteen percent (15%) of fair market value. The assessment of these preferred companies was in clear violation of Article VII of the Louisiana Constitution and Louisiana statutory law on ad valorem taxation. Under *Sioux City Bridge Co.* and the subsequent line of federal and state cases, the appropriate remedy where the systematic under assessment by state officials of other property in the same class contravenes the constitutional rights of others taxed on the full value and percentage of their property is to employ the same valuation and assessment methodology as that used to assess the preferred properties. This holds true even in the instance, such as the case at hand, where the valuation and assessment methodology employed for the preferred properties is

contrary to state law. *Sioux City Bridge Co.*, 260 U.S. at 446-447, 43 S.Ct. at 192. The ultimate goal is to achieve uniformity and equality.

It should be noted that reassessment in the case at hand does not violate the plaintiffs' due process rights. Following reassessment, the assessors are required, pursuant to La. R.S. 47:1992(A)(1), to prepare a list showing the assessment of immovable and movable property of the affected pipeline companies in and for the parish or district and expose the list daily for inspection by the plaintiffs and other interested parties for a period of fifteen days. Thereafter, the lists as changed by each assessor shall be certified to the board of review within three days in accordance with La. R.S. 47:1992(B).[14] Accordingly, the plaintiffs will have ample opportunity to object, if necessary, to the local assessors' valuations. Therefore, the remedy ordered by the trial court is both just and equitable. Accordingly, we affirm the judgment of the trial court to the extent that the matter was remanded to

---

[14] Louisiana Revised Statutes 47:1992, as it currently reads, provides as follows:

> A. (1) After each assessor has prepared and made up the lists showing the assessment of immovable and movable property in and for his parish or district, his lists shall be exposed daily for inspection by the taxpayers and other interested persons for the period provided for in Subsection G of this Section. Each assessor shall give notice of such exposure for inspection in accordance with rules and regulations established by the Louisiana Tax Commission.
>
> . . . .
>
> B. After the lists of each assessor have been exposed for inspection for the period provided for in Subsection G of this Section, the lists as changed by each assessor shall be certified to the board of review within three days, which board shall conduct public hearings for all persons or their representatives desiring to be heard on the assessments of immovable and movable property. Notice of such public hearings shall be given by each assessor in accordance with rules and regulations established by the tax commission.

the Commission with instructions that the Commission require the parish assessors to assess the public service pipelines of the plaintiffs for each of the years at issue and calculate taxes based on fifteen percent (15%) of those assessments.

Commerce Clause

Next, plaintiffs allege that the trial court erred in declining to address their commerce clause challenges. Pursuant to La. R.S. 47:1851(K), any pipeline regulated by the Public Service Commission or the Federal Energy Regulatory Commission is considered a public service property taxpayer and thus subject to assessment by the Commission at twenty-five percent (25%) of the fair market value under Article VII, § 18(B) of the Louisiana Constitution. Intrastate pipeline companies, by contrast, are regulated by the Louisiana Department of Natural Resources pursuant to La. R.S. 30:551(A) and are assessed at fifteen percent (15%) of fair market value under Article VII, § 18(B) of the Louisiana Constitution as "other property." Plaintiffs submit that they presented ample evidence at trial of the close competition between interstate and intrastate natural gas pipeline companies. Plaintiffs argue, therefore, that La. R.S. 47:1851(K), when read in combination with Article IX, § 2(A) of the Louisiana Constitution and La. R.S. 30:551(A), discriminates against interstate natural gas pipeline companies in per se violation of the commerce clause.[15]

---

[15] Article IX, § 2(A) of the Louisiana Constitution provides:

Section 2. *(A) Public Policy; Regulation.* Natural gas is declared to be affected with a public interest. Notwithstanding any provision of this constitution relative to the powers and duties of the Public Service Commission, the legislature shall provide by law for regulation of natural gas by the regulatory authority it designates. It may designate the Public Service Commission as the regulatory authority.

Plaintiffs submit that the judgment of the trial court does not adequately remedy violations of the commerce clause. In *McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco, Dept. of Business Regulation of Fl.*, 496 U.S. 18, 40-41, 110 S.Ct. 2238, 2252, 110 L.Ed.2d 17 (1990), wholesale liquor distributors filed suit, challenging the Florida excise tax that gave preferential treatment to beverages that were manufactured from Florida-grown citrus and other agricultural crops and bottled in state. On certiorari, the United States Supreme Court held that if a state penalizes taxpayers for failure to remit their taxes in a timely fashion, thus requiring them to pay first and obtain review later, the due process clause requires that the state afford a meaningful postpayment remedy for taxes paid pursuant to an unconstitutional tax scheme, i.e., a refund of the excess tax or a partial retroactive assessment of tax increases on the favored competitors. In the instant case, plaintiffs argue that under this rationale, only a full refund of all taxes paid under protest can rectify the unconstitutional discrimination to which plaintiffs have been subjected by Louisiana's ad valorem tax scheme.

In response to plaintiffs' appeal, the Commission submits that the trial court was correct in declining to rule on the constitutionality of La. R.S. 47:1851(K). Moreover, the Commission contends that even if the trial court had found a violation of the commerce clause, the remedy would have been the same. Specifically, the Commission argues that a finding that La. R.S. 47:1851(K) is unconstitutional would mean that the plaintiffs would no longer be classified as the owners of "public service property" for ad valorem tax purposes. Accordingly, their assessments based on this classification would be vacated and plaintiffs would be reassessed as owners of nonpublic service property. Since this is exactly the remedy ordered by the trial court, the Commission submits that no harm was suffered by the court's failure to consider the plaintiffs' commerce clause claims.

A court should not reach or determine constitutional issues unless, in the context of a particular case, the resolution of such issues is necessary to decide the case. *La. Assoc. Gen. Contractors, Inc. v. New Orleans Aviation Bd.*, 97-0752, p. 3 (La.10/31/97), 701 So.2d 130, 132; *Cameron Parish Sch. Bd. v. ACandS, Inc.*, 96-0895, p. 5 (La.1/14/97), 687 So.2d 84, 87. "No rule of practice is better-settled than 'never to anticipate a question of constitutional law in advance of the necessity of deciding it.'" *Matherne v. Gray Ins. Co.*, 95-0975, p. 3 (La.10/16/95), 661 So.2d 432, 434 (quoting *Communist Party of U.S. v. Subversive Activities and Control Board*, 367 U.S. 1, 72, 81 S.Ct. 1357, 1397, 6 L.Ed.2d 625 (1961)).

In this case, the plaintiffs seek refunds for those years in which taxes were paid under protest. To the extent that the plaintiffs may obtain adequate relief through reassessment and refund, the trial court was correct in declining to address the plaintiffs' claim that La. R.S. 47:1851(K) is unconstitutional. Accordingly, we affirm the judgment of the trial court to the extent that the trial court avoided any decision on the constitutionality of La. R.S. 47:1851(K) and (M).

The Party Cast in Judgment

The plaintiffs allege that the trial court improperly designated the Commission as the party owing a refund. Specifically, plaintiffs contend that La. R.S. 47:1856 obligates each affected taxing jurisdiction to issue a credit or refund upon a determination that the assessed valuation is less than the amount set by the Commission. In this sense, plaintiffs submit that the judgment should be revised to provide that refunds are due from each of the affected taxing jurisdictions, rather than the Commission.

It should be noted that the Commission supports this position. In its answer to the appeal, the Commission submits that the protested tax payments at issue in the underlying suits

are in the possession of the parochial and municipal tax collectors to whom they were paid. The Commission suggests, therefore, that it has neither the financial nor jurisdictional ability to issue refunds. Accordingly, to the extent the judgment imposes a financial obligation on the Commission, the Commission submits that the judgment should be modified to recognize that its duty to issue refunds is to be accomplished through a change in the tax rolls under La. R.S. 47:1837.

Although the Commission is the proper party defendant, the local assessors are the parties responsible for the refunds owed plaintiffs. To the extent that the local assessors, not the Commission, are in actual possession of the taxes paid under protest, we hereby amend the judgment to reflect that the Commission shall cause a refund to issue through the modification of the tax rolls.

Refund Deadline

The judgment appealed from mandates that the Commission issue to all plaintiffs a full refund, plus interest, of the difference between the amounts paid for each year and the reassessed amount no later than September 30, 2005, within six months following the date of judgment. The Commission has answered the appeal and prayed that the judgment be modified to extend the deadline for completion of reassessment to six months following finality of judgment. Due to the delays occasioned by this appeal, we find that an extension of the deadline for issuance of refunds is warranted. Accordingly, we hereby amend the judgment to provide that the deadline for completion of reassessment is six months from the date the judgment becomes final.

The Commission's Claim for Frivolous Appeal

In its answer to the plaintiffs' appeal, the Commission has made a claim for damages for frivolous appeal. The impo-

sition of damages for a frivolous appeal is regulated by La.Code Civ. P. art. 2164. The courts have been very reluctant to grant damages under this article, as it is penal in nature and must be strictly construed. *Guarantee Sys. Const. & Restoration, Inc. v. Anthony*, 97-1877, p. 13 (La.App. 1 Cir. 9/25/98), 728 So.2d 398, 405, *writ denied*, 98-2701 (La.12/18/98), 734 So.2d 636. Furthermore, in order to assess damages for frivolous appeal, it must appear that the appeal was taken solely for the purpose of delay or that appellate counsel does not sincerely believe in the view of law he advocates. *Cortes v. Lynch*, 2002-1498, p. 14 (La.App. 1 Cir. 5/9/03), 846 So.2d 945, 954. When an appellee asks that the judgment be amended, damages for a frivolous appeal will not be allowed. *Parker, Seale & Kelton v. Messina*, 214 La. 203, 36 So.2d 724, 728 (1948).

In this case, the Commission has answered the plaintiffs' appeal and prayed that the judgment appealed from be modified to extend the deadline for completion of reassessment to six months following finality of judgment and to provide for the issuance of refunds in accordance with statutory provisions governing modification of tax rolls. To the extent that the Commission has answered the appeal and requested modification of the judgment, the Commission admits that the judgment is at least partially in error. Further, there is no indication that counsel for the plaintiffs brought this appeal to delay litigation or does not have a reasoned belief in the merits of the appeal. Accordingly, we find that damages for frivolous appeal are not warranted.

CONCLUSION

For the above and foregoing reasons, we hereby affirm the judgment of the trial court to the extent that declaratory judgment was rendered in favor of plaintiffs, finding that the actions of the Commission in the administration of Louisiana's ad valorem tax scheme, as it pertains to plaintiffs' public service pipelines, have violated the equal protection

and due process clauses of the Louisiana and United States Constitutions, and to the extent that the trial court declined to make any determination as to the constitutionality of La. R.S. 47:1851(K) and (M). We further affirm the judgment of the trial court to the extent that the matter was remanded to the Commission with instructions that the Commission require the parish assessors to assess the public service pipelines of the plaintiffs for each of the years at issue and that taxes be calculated based on fifteen percent (15%) of those assessments. The judgment is hereby amended to provide that the Commission shall cause to issue to plaintiffs a full refund, plus interest, of the taxes paid under protest no later than six months from the date this judgment is final, pursuant to its authority under La. R.S. 47:1837(C)(5) to direct the local tax collectors to correct the assessments on the tax rolls. The Commission's claim for damages for frivolous appeal is hereby denied. All costs associated with this appeal shall be paid by the plaintiffs.

AMENDED IN PART, AND AS AMENDED, AFFIRMED. DAMAGES FOR FRIVOLOUS APPEAL DENIED.

APPENDIX B

19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

NO: 468,417
SEC: 22

ANR PIPELINE COMPANY

Versus

LOUISIANA TAX COMMISSION

CONSOLIDATED WITH DOCKET NUMERS: 480,159; 480,160; 480,161; 480,162; 480,163; 480,373; 489,776; 489,777; 489,778; 489,779; 489,780; 489,803; 491,530; 491,744; 491,745; 491,746; 491,912; 503,466; 503,468; 503,469; 503,470; 515,414; 515,415; and 515,416

WRITTEN REASONS FOR JUDGMENT

These consolidated cases came before the Court for a bench trial on January 10, 2005 through January 12, 2005, and concluded on January 18, 2005. Plaintiffs, ANR Pipeline Company (hereinafter "ANR"), UT Offshore System, L.L.C. (hereinafter "UTOS"), High Island Offshore System, L.L.C. (hereinafter "HIOS"), Stingray Pipeline Company (hereinafter "Stingray"), Tennessee Gas Pipeline Company (hereinafter "TGP"), and Southern Natural Gas Company (hereinafter "SNG"), have sought declaratory judgment that their ad valorem tax assessments for a number of years are

unconstitutional and that they are entitled to a refund of taxes paid under protest for each of those tax years.[1]

Present in Court on all four days were the following: Hilton S. Bell, Angela Adolph, Laurence E. Garrett, and James A. Porter, counsel for plaintiffs; and Brian A. Eddington and Robert D. Hoffman, Junior, counsel for defendant, Louisiana Tax Commission. Evidence was presented, testimony was taken, and arguments were made. This Court ordered the parties to submit post-trial briefs by Monday, February 7, 2005. This Court allowed a brief extension of time due to official Court holidays. All briefs were submitted by the extended deadline, at which time the matter was submitted and taken under advisement by this Court.

1. *Factual and Procedural History*

Plaintiffs provide natural gas transportation, storage, and balancing services to customers in Louisiana and in interstate commerce. They own interstate natural gas transmission pipelines and related property in Louisiana, and each is regulated by the Federal Energy Regulatory Commission as a "natural gas company" pursuant to the Natural Gas Act, 15 U.S.C. §717, *et seq*. Plaintiffs are public service property taxpayers within the meaning of La. R.S. 47:1851K and M for ad valorem tax purposes. All plaintiffs are properly qualified to do business in Louisiana.

After receiving initial determinations of assessed valuation from the Louisiana Tax Commission (the "Commission") for each tax year at issue herein for their respective public service

---

[1] ANR paid a portion of its ad valorem taxes under protest for each tax year from 1994 through 2003; TGP and SNG paid a portion of their ad valorem taxes under protest for each tax year from 2000 through 2003; HIOS paid a portion of its ad valorem taxes under protest for each tax year from 2000 through 2002; UTOS paid a portion of its ad valorem taxes under protest for each tax year for 2000 and 2001; and Stingray paid a portion of its ad valorem taxes under protest for 2000.

properties, plaintiffs filed timely protests with the Commission. In their protests, plaintiffs alleged that the Commission's determinations of assessed valuation of their public service properties, other than land, were unconstitutional because the assessed values of their properties were calculated at 25% of fair market value while the assessed values of the property, other than land, of their similarly situated competitors and other pipeline public service taxpayers were calculated at only 15% of fair market value.[2] Plaintiffs claimed this disparate tax treatment resulted in 67% higher ad valorem property tax assessments than those imposed upon their similarly situated competitors and other pipeline public service taxpayers.

For each tax year at issue herein, plaintiffs paid the undisputed portion of their tax bills in full to the tax collector for each taxing jurisdiction in which they owned public service property and paid the disputed portion of their ad valorem taxes under protest to each such tax collector. The amount paid under protest was determined by calculating the difference between taxes paid on the assessed value at 25% of fair market value and taxes that should have been paid on the assessed value at 15% of fair market value of the plaintiffs' public service properties. Plaintiffs filed individual suits for declaratory judgment and for refund of taxes paid under protest. These suits were consolidated for trial.[3]

---

[2] Hereinafter, the Court's references to plaintiffs' public service property shall mean plaintiffs' public service property, other than land.

[3] For a complete procedural history of this case, see *ANR Pipeline Company v. Louisiana Tax Commission, et al.*, No. 2000-2251 (La.App. 1 Cir. 12/22/00), 774 So.2d 1261, *writ denied*, 2001-0250 (La. 4/20/01), 790 So.2d 633; *ANR Pipeline Company v. Louisiana Tax Commission*, 2001-CA-2594 (La.App. 1 Cir. 3/20/02), 815 So.2d 178; *ANR Pipeline Company v. Louisiana Tax Commission*, 2002-1479 (La. 7/2/03), 851 So.2d 1145; and *ANR Pipeline Company v. Louisiana Tax Commission*, 2001-CA-2594R (La.App. 1 Cir. 2/23/04), 868 So.2d 950.

II. *Louisiana's Ad Valorem Tax Scheme for Natural Gas Pipeline Companies*

Under the Louisiana Constitution, the assessed value of "public service properties" is 25% of fair market value for ad valorem tax purposes while the assessed value of "other property" is 15% of fair market value. La. Const. Art. VII, §18(B). Local assessors are to determine the fair market value of all property subject to taxation within their respective parishes, except public service property, according to the criteria established by law, which must be applied uniformly throughout the state. La. Const. Art. VII, § 18(D). The fair market value of public service properties is to be determined by the Louisiana Tax Commission. *Id.*

Under La. R.S. 47:1853, the Commission is to appraise public service property based upon the property's fair market value, utilizing nationally recognized techniques of appraisal to best determine fair market value.[4] The Commission values

---

[4] La. R.S. 47:1853 establishes the method of appraising public service properties as follows:

> B (1) In appraising public service properties, the Louisiana Tax Commission shall:
>
> (a) Employ all of the following nationally recognized techniques of appraisal, where applicable, to best determine fair market value:
>
> (i) The market approach.
>
> (ii) The cost approach.
>
> (iii) The income approach.
>
> (b) Assign such weight to each approach as is appropriate to best determine fair market value.
>
> (2) However, all public service properties of the same nature and kind shall be appraised in the same manner
>
> . . . .
>
> D In no event, however, shall the Louisiana Tax Commission adopt schedules that reflect average life values of the property instead of appraising the individual companies.

public service property under the unitary method by which the fair market value of the entire business enterprise is determined. This Court notes that the Commission is prohibited from using average cost schedules instead of appraising the individual companies. La. R.S. 47:1853D. The fair market value of the unit is then apportioned to Louisiana based upon factors set forth in La. R.S. 47:1855D. The Commission then determines the assessed valuation (10% for land and 25% for all other property) and allocates the assessed valuation among the local taxing units on or before September 1 of each calendar year. La. R.S. 47:1855A.

A pipeline company is classified as a public service company if it is regulated by the Louisiana Public Service Commission (hereinafter "PSC") or is a "natural gas company" regulated by the Federal Energy Regulatory Commission (hereinafter "FERC"). La. R.S. 47:1851K.[5] FERC is the successor to the Federal Power Commission, and regulates only pipelines engaged in the transportation of natural gas in interstate commerce. As previously noted, plaintiffs are regulated by FERC as natural gas companies and, thus, are public service taxpayers.

Intrastate natural gas pipeline companies are not regulated by FERC. Regulatory authority over intrastate natural gas pipeline companies has, with a very limited exception, been delegated to the Louisiana Department of Natural Resources (hereinafter "DNR"). See La. Const. Art. IX, §2(A) and La.

---

[5] "'Pipeline company' means any company that is engaged primarily in the business of transporting oil, natural gas, petroleum products, or other products within, through, into, or from this state, and which is regulated by (1) the Louisiana Public Service Commission, (2) the Interstate Commerce Commission, or (3) the Federal Power Commission, as a 'natural gas company' under the federal Natural Gas Act, 15 U.S.C. §§717-717w, because that person is engaged in the transportation of natural gas in interstate commerce, as defined in the Natural Gas Act." La. R.S. 47:1851K. The Court notes that the Interstate Commerce Commission is now defunct.

R.S. 30:551. Thus, most intrastate natural gas pipeline companies engaged in the transportation of natural gas are assessed at 15% of fair market value as "other properly."

However, there are a number of intrastate pipeline transporters of natural gas that were regulated by the PSC during the tax years in question and were thus classified as public service companies under La. R.S. 47:1851K. Such companies were identified at trial as Acadian Gas Pipeline Company, Louisiana Intrastate Gas Company, Cypress Gas Pipeline, and Tuscaloosa Pipeline Company. (Plaintiffs' Exhibit 156). There are also a number of oil and other liquid pipeline companies operating in Louisiana that were classified as public service companies under La. R.S. 47:1851K and M because they, too, were regulated by the PSC during the tax years in question. Such companies were identified at trial as Harvest Pipeline, Atchafalaya Pipeline, Plains Marketing, Unocal, XPLOR Energy, Union Texas Petroleum Pipeline, Bayou City Pipeline, and Araxas Exploration. (Plaintiffs' Exhibit 156).

III. *Constitutional Challenges*

A. Uniformity of Taxation Claims

The plaintiffs' first challenge to the constitutionality of Louisiana's ad valorem tax scheme charges that, in violation of the Louisiana Constitution, the Commission failed to uniformly assess at 25% of fair market value the property of pipelines that were regulated by the PSC. The requirement for uniformity of ad valorem property tax assessments is set forth in Article VII, §18 of the Louisiana Constitution of 1974, which provides, in pertinent part:

> (A) Assessments. Property subject to ad valorem taxation shall be listed on the assessment rolls at its assessed valuation, which . . . shall be a percentage of its fair market value. *The percentage of fair market value shall*

be uniform throughout the state upon the same class of property.

(B) Classification. The classifications of property subject to ad valorem taxation and the percentage of fair market value applicable to each classification for the purpose of determining assessed valuation are as follows:

Classification	Percentages
1. Land	10%
2. Improvements for residential purposes	10%
3. Electric cooperative properties, excluding land	15%
4. Public service properties, excluding land	25%
5. Other properly	15%

. . . .

(D) Valuation. Each assessor shall determine the *fair market value* of all property subject to taxation within his respective parish or district except public service properties, which shall be valued at *fair market value* by the Louisiana Tax Commission or its successor . . . . *Fair market value . . . of property shall be determined in accordance with criteria which shall be established by law and which shall apply uniformly throughout the state.*

(Emphasis added.)

The uniformity clause found in Article VII, §18 of the Louisiana Constitution has two parts. First, §18(A) guarantees uniformity as to the ratio of fair market value assessed. As noted by the First Circuit in *Bussie v. Long*, 286 So.2d

689, 700 (La.App. 1 Cir. 1973), *cert. denied*, 288 So.2d 354 (La. 1974):

> It is settled that a taxpayer is entitled to have his property taxed at that percentage of value applicable to others equally and similarly situated . . . The rule is based on the principle that if both the standard of true value and the uniformity and equality required by law cannot be achieved, equality and uniformity is preferred under the law. *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 43 S.Ct. 190, 67 L. Ed. 340, 28 A.L.R. 979.

Second, §18(D) guarantees uniformity as to the method used to determine fair market value of property in the same class. *See, e.g., Telecable Associates, Inc. v. Louisiana Tax Commission, et al.*, 94-0499 (La.App. 1 Cir. 11/9/95), 694 So.2d 279 (assessors' unilateral creation and use of separate formula to value cable company's property violated uniformity requirements); and *The Kansas City Southern Railway Company v. Louisiana Tax Commission*, 95-2319 (La.App. 1 Cir. 6/28/96), 676 So.2d 812 (Commission's utilization of different approaches to value property within the same class violated uniformity requirements).

The jurisprudence is clear that mere error or inadvertent omission on the part of the taxing authority, which may result in a technical violation of the uniformity requirements, is insufficient to support a constitutional challenge. *See, e.g., Sioux City Bridge v. Dakota County*, 260 U.S. 441, 43 S.Ct. 190, 67 L.Ed. 340 (1923). As noted in *Sioux City Bridge*, "there must be something more—something which in effect amounts to an intentional violation of the essential principle of practical uniformity." *Id.* at 447.

The burden is on the taxpayer to establish that the taxing authority intentionally failed to value property uniformly within its jurisdiction as required by the Louisiana Constitution. However, the Court may infer intent based on a sys-

tematic lack of uniformity. For instance, in *Weissinger v. Boswell*, 330 F.Supp. 615 (M.D.Ala. 1971), the district court found the state's failure to rectify its discriminatory tax assessment practices after learning of a disparity in assessment ratios constituted an intentional and systematic violation of uniformity requirements. The district court stated, "[t]he evidence further reflects that this lack of uniformity has resulted not from mere mistake or error in judgment, but from the intentional and systematic refusal of defendant and his predecessors in office to perform their duties in accordance with the law." 330 F.Supp. at 622. *See also The Kansas City Southern Railway, supra*; and *MidLouisiana Rail Corporation v. Louisiana Tax Commission*, 588 So.2d 1163 (La.App. 1 Cir. 1992).

As noted above, there are a number of pipeline companies that were regulated by the PSC during the tax years in question. (Plaintiffs' Exhibit 156). These companies (hereinafter "preferred companies") owned public service property that should have been assessed by the Commission at 25% of fair market value. Instead, their property was assessed at 15% of fair market value. Beginning in 1994, the Commission was put on notice through ANR's formal protest that public service property owned by the preferred companies was not being valued and assessed by the Commission at 25% of fair market value, as required by law. Further, in the Pre-Trial Order, the Commission also stipulated that it had failed to value and assess the public service property of certain of such companies, namely Acadian Gas Pipeline Company, Louisiana Intrastate Gas Company, Cypress Gas Pipeline, and Tuscaloosa Pipeline Company.

During trial, the Commission's representative, Vergie Booty, confirmed that the Commission had failed to value and assess the public service property of these companies.[6]

---

[6] Plaintiffs identified 12 PSC-regulated pipelines that were intentionally not valued and assessed by the Commission, which represents be-

She testified that, although the Commission had previously refused to value and assess such public service property of these preferred companies because of the instant litigation, the Commission has reversed course and now intends to value and assess such public service property of these preferred companies beginning with the 2005 tax year. When questioned by this Court, Ms. Booty candidly admitted that the Commission's failure to value and assess PSC-regulated pipelines after being notified by plaintiffs of the disparate treatment was the result of an intentional decision on the part of the Commission.

Consequently, this Court finds that this is not the sort of inadvertent omission allowed by *Sioux City Bridge*, but instead constitutes intentional and systematic failure to apply Louisiana's ad valorem tax laws uniformly. The intentional and systematic failure of the Commission to value and assess PSC-regulated pipelines is further evidenced by the fact that the Commission could have, at any time, obtained a list of PSC-regulated pipelines by simply requesting the information from the PSC. Therefore, this Court finds that the Commission intentionally violated the uniformity requirements of the Louisiana Constitution.[7]

B. Equal Protection and Due Process Clauses Claims

Plaintiffs also claim that the Commission's administration of Louisiana's ad valorem tax scheme violates the equal protection and due process clauses of the United States and Louisiana Constitutions. U.S. Const. Amend. XIV; La. Const. Art. I §3. As noted above, the Commission intentionally

---

tween 23% to 19% of the total number of Commission assessed pipelines during the tax years at issue. Commission records reflect that it assessed 52 pipelines in 1994 and 64 pipelines in 2003.

[7] The Court notes that the Commission stipulated to and admitted this constitutional violation in Paragraphs 5 and 6 of Section C of the Pre-Trial Order.

failed to assess the property of certain pipeline public service taxpayers at 25% of fair market value as required by law. At trial, Ms. Booty testified that the local assessors assessed the public service property of the preferred companies at 15% of fair market value.

Where certain taxpayers are systematically assessed taxes based on a higher ratio of fair market value than other taxpayers in the same class, the assessments are discriminatory and in violation of the equal protection clause of the United States Constitution. *Bussie, supra.* In that case, the First Circuit held:

> A state may establish reasonable classifications for the taxing of property at different, rates. However, if state law requires that all property be taxed at a uniform rate and has enacted laws to [i]nsure such result, any substantial disparity or difference in taxes arising from failure of state officers to properly administer the laws will be held in violation of the due process and equal protection clauses of the United States Constitution.

Bussie, 286 So.2d at 701. *See also Sioux City Bridge, supra* (assessments of one taxpayer's property at 100% of fair market value while like property of other taxpayers was assessed at 55% of fair market value violated Fourteenth Amendment); *Allegheny Pittsburgh Coal Company v. County of Webster*, 488 U.S. 336, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989) (assessments that were consistently higher than assessments on comparable property violated the equal protection clause of the United States Constitution); *Weissinger, supra* (state's use of assessment ratios ranging from 7% to 27% on comparable property within the same class violated Fourteenth Amendment); and *The Kansas City Southern Railway Company, supra* (denial of uniformity in the form of under-assessment of other taxpayers is a violation of constitutional rights).

In this case, there can be no question but that the Commission intentionally failed to apply Louisiana's ad valorem tax laws uniformly. The property of a significant number of public service pipeline companies was identified as being assessed by Parish assessors at only 15% of fair market value while the property of the instant plaintiff public service taxpayers was assessed by the Commission at 25% of fair market value. This Court finds that this systematic and intentional failure to properly and uniformly administer Louisiana's ad valorem tax laws violated the equal protection and due process clauses of the United States and Louisiana Constitutions.

C. Other Constitutional Challenges

Plaintiffs also contend that La. R.S. 47:1851K is unconstitutional because it creates a distinction between interstate and intrastate competitors that results in an impermissible burden on interstate commerce in violation of the commerce clause of the United States Constitution. Further, plaintiffs claim that La. R.S. 47:1851K is unconstitutional because it operates to classify some (but not all) pipelines as public service property subject to taxes based on 25% of fair market value, thereby, resulting, in a violation of their equal protection and substantive due process rights required under the United States and Louisiana Constitutions.

Having earlier found that Louisiana's uniformity requirements were intentionally violated by the Commission and that the plaintiffs' equal protection and due process rights under the United States and Louisiana Constitutions were violated because of the Commission's total disregard of the law, *i.e.* the uniformity requirements, this Court need not address any other constitutional challenges. It is well settled jurisprudence that statutes are presumed constitutional, and if the issue of the case can be decided without breaching that presumption, then the issue of whether or not the statute is constitutional

should not and need not be decided. The Louisiana Supreme Court has stated:

> A court should lot reach or determine constitutional issues unless, in the context of a particular case, the resolution of such issues *is necessary to decide the case. Cameron Parish School Bd. v. ACandS, Inc.*, 96-0895 p. 5 (La.1/14/97), 687 So.2d 84, 87. "No rule of practice is better settled than never to anticipate a question of constitutional law in advance of the necessity of deciding it." *Matherne v. Gray Ins. Co.*, 95-0975 p. 3 (La.10/16/95), 661 So.2d 432, 434.

Louisiana Associated General Contractors, Inc. v. New Orleans Aviation Bd., 701 So.2d 130, 132 (La. 1997).

In this case, it is not necessary to decide whether or not La. R.S. 47:1851K violates the United States or Louisiana Constitutions. As implied in this decision, at footnote 1, this case only involves those monies for those years that were paid under protest. This Court's decision dealing with uniformity sufficiently addresses the plaintiffs' petitions concerning their monies paid under protest. Their petitions cannot and do not specifically, per se, address any relief for the refund of taxes of future tax years not yet paid under protest since this Court has decided the *current and present controversy* by way of the plaintiffs' uniformity challenge. Therefore, this Court must pretermit any discussion of the constitutionality of La. R.S. 47:1851K.

IV. *Plaintiffs' Remedies*

Plaintiffs maintain that they are entitled to a refund of taxes paid under protest for each of the tax years at issue, and interest at the lawful rate. The Commission has argued throughout the entirety of this case that, even if plaintiffs prevailed, they could not recover taxes paid under protest. For the reasons set forth below, this Court finds that plaintiffs are entitled to a refund of taxes paid under protest, plus interest.

The amount of refund, however, must be calculated by the Louisiana Tax Commission as set forth hereinafter.

In *Sioux City Bridge, supra*, the Supreme Court rejected the notion that a taxpayer's remedy for lack of uniformity in assessments is to raise the assessment of property that has been under assessed. 260 U.S. 446; *see also Iowa-DesMoines Nat'l Bank v. Bennett*, 284 U.S. 239, 52 S.Ct. 133, 76 L.Ed. 265 (1931) (a taxpayer who has been subjected to discriminatory taxation cannot be required to assume the burden of seeking an increase of the taxes which others have paid, nor may he be remitted to the necessity of awaiting such action by state officials on their own initiative).

Article VII, §3(A) of the Louisiana Constitution states:

> The legislature shall prohibit the issuance of process to restrain the collection of any tax. It shall provide a complete and adequate remedy for the prompt recovery of an illegal tax paid by a taxpayer.

In accordance with the mandate of Article VII, §3(A) of the Louisiana Constitution, the legislature enacted the remedy for public service taxpayers in Louisiana to contest the validity and legality of an ad valorem tax assessment, which is set forth in La. R.S. 47:1856E, 2110E and 1856F.

This Court has found that the Commission did not follow the Constitutional mandate of uniformity of taxation. Therefore, under the circumstances of this case on which this ruling is based, this Court finds that the proper remedy is to treat plaintiffs as they must be treated—uniformly with the preferred companies. Consequently, since the property of the preferred companies was assessed by the Parish assessors at a rate of 15% of fair market value, the properly of the plaintiffs must also be assessed by the Parish assessors at a rate of 15% of fair market value utilizing the same methodology as used for the preferred companies for the tax years at issue in this case. As the Commission is expressly authorized to correct or

change public service property assessments, as well as order the Parish assessors to appraise/reappraise the properties, this remedy is consistent with, and within the authority of, the statutory scheme set forth for the Louisiana Tax Commission.

Specifically, La. R.S. 47.1837 states, in pertinent part:

> A. In addition to any duties, powers, or responsibilities otherwise conferred upon the tax commission, it shall administer and enforce all laws related to the state supervision of local property tax assessments and the assessment of public service properties.
>
> B. (1) The tax commission shall measure the level of appraisals or assessments and the degree of uniformity of assessments for each major class and type of property in each parish throughout the state. . . .
>
> (2) In a year in which the tax commission orders reappraisal of all property within a parish or district or within one or more property classifications, the commission shall:
>
> (a) Inform the assessor in detail of the exact nature of the discrepancies and deviations discovered by the tax commission in its measurement of assessment levels.
>
> (b) Establish a schedule for accomplishment of the ordered reappraisal.
>
> (c) Monitor the reappraisal on a weekly basis to ensure that the established schedule is being met and that there are not substantial deviations and discrepancies in the reappraisals.
>
> (d) Provide technical assistance to ensure accurate and timely reappraisal.
>
> C. The tax commission shall make the necessary inspections, investigations, and studies for the adequate

administration of its responsibilities pursuant to this Section.

. . . .

(5) The tax commission shall authorize and direct the collector to correct the assessment on the roll on file in his office and the recorder of mortgages of the appropriate parish or parishes to change the inscription of tax mortgages pursuant to R.S. 39:351 and R.S. 47:1991.

D. In order to promote compliance with the requirements of the constitution and laws of the state, the tax commission shall issue and, from time to time, may amend or revise rules and regulations containing minimum standards of assessment and appraisal performance. Such standards shall include, but shall not be limited to the following:

(1) The tax commission shall devise, prescribe, and require the use of all forms deemed necessary for the effective administration of the property tax laws.

(2) The tax commission shall prepare, issue, and periodically revise guides for the use of local assessors in the form of handbooks of rules and regulations, appraisal manuals, special manuals and studies, cost and price schedules, news and reference bulletins, and digests of property tax laws suitably annotated.

(3) The tax commission shall develop, maintain, and enforce a uniform statewide system for the preparation of assessment lists, tax rolls, and all other necessary forms.

In addition, La. R.S. 47:1857(A) states:

A. The Louisiana Tax Commission is authorized and empowered to correct or change the assessment of any company under this Part in order to make the assessment conform to the true facts. In order to correct or change any such assessment, it shall be necessary for the Louisi-

> ana Tax Commission to issue instructions to the assessor to make the change upon the assessment roll, and in the event the assessment roll has been delivered to the tax collector, then to direct the tax collector to make such change upon the roll in his possession and to collect taxes according to such change, and to notify the company of the corrections or changes so made. This notice shall be delivered by certified mail, return receipt requested, addressed to or by personal service upon, the officer or authorized agent of the company responsible for the filing of the annual report.

This Court notes that this remedy is also in accordance with the First Circuit's ruling within an earlier stage of this very case. Specifically, the First Circuit, in *ANR Pipeline Co. v. Louisiana Tax Com'n*, 868 So.2d 950 at 955, 2001-2594, (La.App. 1 Cir. 2004), stated:

> The authority and duty to supervise and regulate the assessments of local property taxes and public service properties clearly fall under the aegis of the LTC. La. R.S. 47:1837. The LTC remains statutorily imbued with the power to ascertain uniformity or lack of uniformity with constitutional or statutory requirements for each parish in the state. La. R.S. 1837 B(1). In the absence of conformity of assessments, the LTC is mandated to order the assessor to reappraise properties. *Id.*

Furthermore, it is imperative that the assessments and refunds be completed in a timely manner. Article VII, §3(A) of the Louisiana Constitution requires prompt recovery of an illegal tax. Consequently, after a careful review of the entire record of the cases within this proceeding, this Court finds that six months is an adequate amount of time to comport with the Louisiana Constitution's mandate of "prompt recovery" and to conduct reassessment and refund any amounts due.

Therefore, this matter is remanded to the Louisiana Tax Commission with instructions to direct the Parish assessors to assess the property of the plaintiffs for each of the years at issue. Plaintiffs are to be refunded any and all amounts that were overpaid for each year, with interest, no later than September 30, 2005.

V. Conclusion

Accordingly, the Court finds that plaintiffs are entitled to declaratory judgment in their favor that:

1. the actions of the Commission in the administration of Louisiana's ad valorem tax scheme, as it pertains to plaintiffs' public service pipelines, have violated the equal protection and due process clauses of the Louisiana and United States Constitutions because of the Commission's disregard of the requirement of uniformity;

2. this Court pretermits any decision on the constitutionality of La. R.S. 47:1851K and M;

3. this matter is remanded to the Commission with instructions that the Commission shall require the Parish assessors to assess the public service pipelines of the plaintiffs for each of the years at issue and that taxes thereof to be calculated by 15% of those assessments; and

4. the Commission is thereafter ordered to issue to all plaintiffs a full refund, plus interest, of the difference between the amount paid for each year and the reassessed amount no later than September 30, 2005.

THUS DONE AND SIGNED this 30th day of March, 2005, Baton Rouge, Louisiana.

/s/ Timothy E. Kelley
TIMOTHY E. KELLEY, JUDGE
19th Judicial District Court
Parish of East Baton Rouge
State of Louisiana

Filed MAR 30, 2005

A TRUE COPY
/s/ [Illegible]
DY. CLERK OF COURT

APPENDIX C

SUPREME COURT OF LOUISIANA

No. 2005-C-2372

ANR PIPELINE COMPANY,

v.

LOUISIANA TAX COMMISSION, MALCOLM B. PRICE, JR., Chairman of the Louisiana Tax Commission, KENNETH P. NAQUIN, JR., Member of the Louisiana Tax Commission, and RUSSEL R. GASPARD, Member of the Louisiana Tax Commission

and All Other Consolidated Cases.

March 17, 2006

Prior report: La.App. 923 So.2d 81

In re ANR Pipeline Co.; UT Offshore System L.L.C.; High Island Offshore System L.L.C.; Stingray Pipeline Co.; Tennessee Gas Pipeline Co.; Southern Natural Gas Co.;— Plaintiff(s); Applying for Writ of Certiorari and/or Review, Parish of E. Baton Rouge, 19th Judicial District Court Div. F, No. 468,417 & Consolidated Cases; to the Court of Appeal, First Circuit, Nos. 2005 CA 1142 through 2005 CA 1169.

Denied.

APPENDIX D

STATE CONSTITUTION

La. Const. art. VII, § 18. Ad valorem taxes

(A) Assessments. Property subject to ad valorem taxation shall be listed on the assessment rolls at its assessed valuation, which, except as provided in Paragraphs (C) and (G), shall be a percentage of its fair market value. The percentage of fair market value shall be uniform throughout the state upon the same class of property.

(B) Classification. The classifications of property subject to ad valorem taxation and the percentage of fair market value applicable to each classification for the purpose of determining assessed valuation are as follows:

Classifications	Percentages
1. Land	10%
2. Improvements for residential purposes	10%
3. Electric cooperative properties, excluding land	15%
4. Public service properties, excluding land	25%
5. Other property	15%

The legislature may enact laws defining electric cooperative properties and public service properties.

* * * *

(D) Valuation. Each assessor shall determine the fair market value of all property subject to taxation within his respective parish or district except public service properties, which shall be valued at fair market value by the Louisiana Tax Commission or its successor. Each assessor shall determine the use value of property which is to be so assessed under the provisions of Paragraph (C). Fair market value and use value of property shall be determined in accordance with criteria which shall be established by law and which shall apply uniformly throughout the state.

* * * *

APPENDIX E

STATE STATUES

La. Rev. Stat. Ann. § 47:1837. Duties and responsibilities

* * * *

D. In order to promote compliance with the requirements of the constitution and laws of the state, the tax commission shall issue and, from time to time, may amend or revise rules and regulations containing minimum standards of assessment and appraisal performance. Such standards shall include, but shall not be limited to the following:

* * * *

(2) The tax commission shall prepare, issue, and periodically revise guides for the use of local assessors in the form of handbooks of rules and regulations, appraisal manuals, special manuals and studies, cost and price schedules, news and reference bulletins, and digests of property tax laws suitably annotated.

* * * *

La. Rev. Stat. Ann. § 47:1851. Definitions

When used in this Part, unless the context requires a different meaning:

* * * *

K. "Pipeline company" means any company that is engaged primarily in the business of transporting oil, natural gas, petroleum products, or other products within, through, into, or from this state, and which is regulated by (1) the Louisiana Public Service Commission, (2) the Interstate Commerce Commission, or (3) the Federal Power Commission, as a "natural gas company" under the Federal Natural Gas Act, 15 U.S.C. §§ 717-717w, because that person

is engaged in the transportation of natural gas in interstate commerce, as defined in the Natural Gas Act.

* * * *

M. "Public service properties" means the immovable, major movable, and other movable property owned or used but not otherwise assessed in this state in the operations of each airline, electric membership corporation, electric power company, express company, gas company, pipeline company, railroad company, telegraph company, telephone company and water company. For each barge line, towing company or private car company, only the major movable property owned or used but not otherwise assessed in this state in interstate or interparish operations shall be considered as public service property.

* * * *

La. Rev. Stat. Ann. 47:1853. Appraisal of public service properties

* * * *

B. (1) In appraising public service properties, the Louisiana Tax Commission shall:

(a) Employ all of the following nationally recognized techniques of appraisal, where applicable, to best determine fair market value:

(i) The market approach.

(ii) The cost approach.

(iii) The income approach.

(b) Assign such weight to each approach as is appropriate to best determine fair market value.

(2) However, all public service properties of the same nature and kind shall be appraised in the same manner. The appraised value of all lands owned by the company in this

state shall be deducted from the total appraised value of the public service properties and shall be assessed by the Louisiana Tax Commission and shown as a separate item on the tax roll.

(3) Notwithstanding any other law to the contrary, for the years 1993 and 1994, the commission shall allocate the value of all inventories of natural gas owned by a pipeline company in this state to each tax jurisdiction in which the inventories are located according to its long-held administrative construction and interpretation of the law. At the expiration of the time provided herein, the commission shall develop a fair, equitable, and consistent system of valuation of such inventories for all parishes affected by any revisions to ad valorem property tax procedures, including but not limited to the parishes of Bienville, East Carroll, Lincoln, and West Carroll.

* * * *

D. In no event, however, shall the Louisiana Tax Commission adopt schedules that reflect average life values of the property instead of appraising the individual companies.

* * * *

La. Rev. Stat. Ann. § 47:1856 (1992). Notice of valuation, hearings, appeals

* * * *

E. Any company instituting suit under these provisions may pay their taxes under protest in the parish where assessed and cause notice to issue in such suit to the collector of the taxes as provided in R.S. 47:2110(E). However, the portion of taxes that are due under the company's own set of assessed valuations which are required by Subsection D of this Section to be set forth in the petition shall be paid without being made subject to the protest.

F. If the assessed valuations finally determined are greater than the company's own set of assessed valuations, the court

shall enter judgment against the company for the additional taxes due together with legal interest from the date of payment under protest until paid. In any case in which a judgment is entered against the company, each tax recipient body shall remit an amount equal to ten percent of the proceeds received pursuant to the judgment to the Louisiana Tax Commission, who shall then forward such amount directly to the state treasurer.

La. Rev. Stat. Ann. § 47:1856 (2001). Notice of valuation, hearings, appeals

* * * *

E. Any company instituting suit under the provisions of Subsection D of this Section shall pay the disputed portion of its taxes under protest to the officer or officers designated by law for the collection of such taxes and shall cause notice or notices to issue in such suit to such officer or officers as provided in R.S. 47:2110(E). However, the portion of taxes that are not in dispute by the taxpayer shall be paid without being made subject to the protest.

F. (1) If the assessed valuation finally determined by the court is greater than the company's own assessed valuation, the court shall enter judgment against the company for the additional taxes due together with interest at the actual rate earned on the funds paid under protest, segregated and invested, which interest shall be paid solely from such funds. In any case in which a judgment is entered against the company, each tax recipient body shall remit an amount equal to ten percent of the proceeds received pursuant to the judgment to the Louisiana Tax Commission, which shall then forward such amount directly to the state treasurer.

(2) If the taxpayer prevails, the court shall enter judgment against the officer or officers designated by law for the collection of such taxes ordering such officer or officers to immediately refund to the company the amount of any over-

payment of taxes together with interest at the actual rate earned on the funds paid under protest, segregated and invested during the period, from the date such funds were received by such officer or officers to the date of such refund or refunds, which interest shall be paid solely from such funds.

La. Rev. Stat. Ann. § 47:1856 (2002). Notice of valuation, hearings, appeals

* * * *

[Text of subsecs. E and F effective until July 1, 2003.]

E. Any company instituting suit under these provisions shall timely pay in full its taxes in the jurisdiction from which its tax bill emanates. Any funds received as payment of taxes under the provisions of this Subsection shall be used only for non-recurring expenses except for any such funds pledged as security for any bonds or other evidences of indebtedness and for any such funds when the proposition approving the millage provides specifically for another intended purpose. The governing authority of any jurisdiction shall not use any such funds for nonrecurring expenses in a manner which will displace, replace, or supplant funds which were otherwise available for such nonrecurring expenses.

F. (1)(a)(i) If the assessed valuation finally determined by the court is less than the amount determined by the Louisiana Tax Commission, the company shall be entitled to a credit against future property taxes in each jurisdiction affected or a refund in cash from each jurisdiction affected. Such credit shall be deducted by the Louisiana Tax Commission from the assessment of the year subsequent to any final determination. If a company chooses a refund, that refund shall be paid by the tax collector of each affected jurisdiction from current tax collections. In no event shall that refund be paid later than ninety days from the date on which the judgment is rendered and becomes final. Interest shall be credited at the minimum rate as provided in R.S. 39:1217.1.

(ii) Notwithstanding Subsubparagraph (i) of this Paragraph, the company shall be granted a refund in cash in the year subsequent to the final determination if the credit granted against taxes in that year does not fully grant to the company the full amount of the credit awarded to the company by the court, along with the interest provided for in Subsubparagraph (i).

(b) The Louisiana Tax Commission may adopt rules and regulations pertaining to credits generally and to the transferability of such credits.

(2) In all cases in which a judgment is entered against the company, each tax recipient body shall remit an amount equal to ten percent of the difference between the amount of taxes received, less any credits, and that which would have been received had the company's own set of assessed valuations been upheld to the Louisiana Tax Commission, which shall then forward such amount directly to the state treasurer.

La. Rev. Stat. Ann. § 47:1856 (2003). Notice of valuation, hearings, appeals

* * * *

[Text of subsecs. E and F effective until July 1, 2005.]

E. Any company instituting suit under these provisions shall timely pay in full its taxes in the jurisdiction from which its tax bill emanates and shall give written notice to the officer or officers designated for the collection of said taxes in the parish or parishes where the property is located, the assessor or assessors for the parish or district, or parishes or districts, where the property is located and the chairman of the Louisiana Tax Commission of the amount of taxes paid that are in dispute.

F.(1)(a)(i) If the assessed valuation finally determined by the court is less than the amount determined by the Louisiana Tax Commission, the company shall be entitled to a credit

against future property taxes in each jurisdiction affected or a refund in cash from each jurisdiction affected. Such credit shall be deducted by the Louisiana Tax Commission from the assessment of the year subsequent to any final determination. If a company chooses a refund, that refund shall be paid by the tax collector of each affected jurisdiction no later than March thirty-first of the year subsequent to any final determination. Interest shall be credited at the minimum rate as provided in R.S. 39:1217.1.

(ii) Notwithstanding Subsubparagraph (i) of this Paragraph, the company shall be granted a refund in cash in the year subsequent to the final determination if the credit granted against taxes in that year does not fully grant to the company the full amount of the credit awarded to the company by the court, along with the interest provided for in Subsubparagraph (i).

(b) The Louisiana Tax Commission may adopt rules and regulations pertaining to credits generally and to the transferability of such credits.

(2) In all cases in which a judgment is entered against the company, each tax recipient body shall remit an amount equal to ten percent of the difference between the amount of taxes received, less any credits, and that which would have been received had the company's own set of assessed valuations been upheld to the Louisiana Tax Commission, which shall then forward such amount directly to the state treasurer.

La. Rev. Stat. Ann. § 47:2110 (1987). Suits to recover taxes paid under protest

* * * *

E. Any taxpayer in the state who has paid his taxes under protest as provided in Subsection A above, and who has filed suit under the provisions of R.S. 47:1856, R.S. 47:1857, or R.S. 47:1998, shall cause to issue in said suit notice to the officer or officers designated for the collection of said taxes

in the parish or parishes where the property is located, and such notice shall be sufficient to cause said officer or officers to further hold said amount segregated pending the outcome of the suit. If it is finally determined that said segregated amount is owed by the taxpayer, in whole or in any part thereof, and if the Louisiana Tax Commission has participated in proving the legality or correctness of the assessments or taxes, each tax recipient body shall remit to the Louisiana Tax Commission an amount equal to ten percent of the proceeds received by the recipient body pursuant to the judgment of the court. This money shall then be forwarded to the state treasurer for deposit in the Louisiana Tax Commission Fund as provided for in R.S. 47:1856.

La. Rev. Stat. Ann. § 47:2110 (2001). Suits to recover taxes paid under protest

* * * *

E. Any taxpayer in the state who has paid his disputed taxes under protest as provided herein and who has filed suit under the provisions of R.S. 47:1856, 1857, or 1998 shall cause to be served in said suit notice to the officer or officers designated for the collection of said taxes in the parish or parishes where the property is located, the assessor or assessors for the parish or district, or parishes or districts, where the property is located and the chairman of the Louisiana Tax Commission, which notice shall be sufficient to cause such officer or officers to further hold said amount segregated pending the outcome of the suit.

La. Rev. Stat. Ann. § 47:2110 (2002). Suits to recover taxes paid under protest

* * * *

[Text of subsec. E effective until July 1, 2003.]

E. Any taxpayer in the state who has paid his disputed taxes under protest as provided herein and who has filed suit

under the provisions of R.S. 47:1856, 1857, or 1998 shall cause to be served in said suit notice to the officer or officers designated for the collection of said taxes in the parish or parishes where the property is located, the assessor or assessors for the parish or district, or parishes or districts, where the property is located and the chairman of the Louisiana Tax Commission.

* * * *

La. Rev. Stat. Ann. § 47:2110 (2003). Suits to recover taxes paid under protest

* * * *

[Text of subsec. E effective until July 1, 2005.]

E. Any taxpayer in the state who has paid his disputed taxes under protest as provided herein and who has filed suit under the provisions of R.S. 47:1856, 1857, or 1998 shall cause to be served in said suit notice to the officer or officers designated for the collection of said taxes in the parish or parishes where the property is located, the assessor or assessors for the parish or district, or parishes or districts, where the property is located and the chairman of the Louisiana Tax Commission.

* * * *

APPENDIX F

BEFORE THE
LOUISIANA TAX COMMISSION

COMMISSION ORDER NO. 05-24-06(A)
(Amending, in Part, Order 05-24-06)

In re: ANR Pipeline Company v. Louisiana Tax Commission, (19th Judicial District Court, Suit No. 542,630, Section 22)

(Decided at the June 1, 2006 Open Session)

By Judgment of the 19th Judicial District Court dated March 30, 2005 the Louisiana Tax Commission was instructed to order the Parish Assessors to reassess the property of ANR Pipeline Co. for tax years 1994-2003; Tennessee Gas Pipeline for tax years 2000-2003; Southern Natural Gas Co. for tax years 2000-2003; High Island Offshore System, LLC for tax years 2000-2002; UT Offshore System, LLC for tax years 2000-2001 and Stingray Pipeline Company for tax year 2000. The First Circuit Court of Appeal subsequently affirmed this Judgment and the Louisiana Supreme Court denied the taxpayers' writ application on March 17, 2006. The denial of this writ application operated to make the Judgment of the 19th Judicial District Court final.

For purposes of implementing this ruling the Commission issued its Order 03-22-06, which cancelled the Commission's determinations of assessed value issued to taxpayers for the previously referenced years and ordered the Assessors for each parish in which these taxpayers own property subject to ad valorem taxation to reassess said property utilizing the same methodologies as used by Parish Assessors in valuing

non-public service property pipelines utilizing an assessment ratio of fifteen percent (15%). Upon completion of reassessment each Assessor was further Ordered, in accordance with La.R.S. 47:1992(A)(1), to prepare and make up a list showing the assessed value of the property of the affected pipeline companies in his parish or district, such list to be certified to the board of review within three days of completion of the public inspection period in accordance with La.R.S. 47:1992(B).

Taxpayers subsequently applied for the issuance of an injunction prohibiting implementation of the Commission's Order 03-22-06. Following hearing the Nineteenth Judicial District Court preliminarily enjoined implementation of the provisions of the Commission's Order No. 03-22-06 canceling the determinations of assessed value issued by the Commission, stating concerns about the possibility of double-taxation and tax liens being improperly imposed based upon reassessment. The Court further directed the Commission to Order the Assessors to accept as timely any and all tax filings and LAT forms submitted by the plaintiffs to parish assessors on or before June 19, 2006.

For purposes of implementing the Judgment of the Nineteenth Judicial District Court and addressing the Court's concerns, the Commissioner issued its Order 05-24-06, which instructed the Assessors to extend the deadline for accepting self-reporting forms to June 19; to provide the affected pipelines with notice, via certified mail, of the exposure of the assessment list; to instruct the Assessors that assessment rolls shall not be recorded in the mortgage records for their respective parish until all appeals challenging their determinations of assessed valuation pursuant to La.R.S. 47:1992, La.R.S. 47:1989 and La.R.S. 47:1998; and, pursuant to authority granted by La.R.S. 47:1993(C), instructing tax collectors not to receive from the assessor any assessment roll relating the reassessment or collect any taxes thereon without the written

consent of the tax commission or the entry of a final judgment from such assessment pursuant to La.R.S. 47:1992, La.R.S. 47:1989 and La.R.S. 47:1998.

It subsequently being noted that the issuance of provisional tax bills showing the actual amount of tax liability upon reassessment will be necessary for purposes of comparative analysis should plaintiffs exercise their right to protest and appeal any assessment prepared pursuant to Order 03-22-06 and it further being noted that Order 05-24-06, as drafted, inadvertently omitted verbiage directing tax collectors to not collect any taxes due on reassessment without written consent of the Commission or the entry of a final Judgment by a Court of competent jurisdiction following protest or appeal, the Commission on motion of Commissioner Naquin and seconded by Commissioner Brupbacher unanimously voted to modify and amend Section 3 of its Order 5-24-06 to provide that tax collectors may issue provisional tax bills relating to the reassessment of plaintiffs' property and to expressly prohibit the collection of taxes pending appeal.

Accordingly, IT IS HEREBY ORDERED:

Section 3 of Order 05-24-06 is hereby amended to provide:

1. Tax collectors shall receive assessment rolls relating to the reassessment of ANR Pipeline Co. for tax years 1994-2003; Tennessee Gas Pipeline for tax years 2000-2003; Southern Natural Gas Co. for tax years 2000-2003; High Island Offshore System, LLC for tax years 2000-2002; UT Offshore System, LLC for tax years 2000-2001 and Stingray Pipeline Company for tax year 2000 from the assessors solely for purposes of preparing provisional tax bills showing the total amount of ad valorem taxes due upon reassessment. Pursuant to its authority under La.R.S. 47:1993(C), the Commission hereby instructs the tax collectors that they are not to issue final tax bills to the above

referenced taxpayers based upon reassessment nor collect any taxes thereon without the written consent of the Commission or the completion of all appeals challenging the assessment pursuant to La.R.S. 47:1992, La.R.S. 47:1989 and La.R.S. 47:1998 as evidenced by the entry of a final judgment by a Court of competent jurisdiction.

2. The provisions of Sections 1, 2 and 4 of Order 5-24-06 are unaffected by this Order.

BY ORDER OF THE
LOUISIANA TAX COMMISSION
June 1, 2006

/s/ Elizabeth L. Guglielmo
Chairman Elizabeth L. Guglielmo
District II

/s/ Kenneth P. Naquin, Jr.
Commissioner Kenneth P. Naquin, Jr.
District III

/s/ Scott Brupbacher
Commissioner Scott Brupbacher
District II

/s/ Vanessa Caston LaFleur
Vanessa Caston LaFleur
General Counsel

/s/ Jill A. Giberga
Commissioner Jill A. Giberga
District I

/s/ Richard Young
Commissioner Richard Young
District IV

Supreme Court, U.S.
FILED
JUL 17 2006
OFFICE OF THE CLERK

No. 05-1606

In the Supreme Court of the United States

ANR PIPELINE COMPANY, *et al.*,

Petitioners,

v.

LOUISIANA TAX COMMISSION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Louisiana Court of Appeal, First Circuit

BRIEF OF THE COUNCIL ON STATE TAXATION, THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, AND THE LOUISIANA ASSOCIATION OF BUSINESS AND INDUSTRY AS AMICI CURIAE IN SUPPORT OF PETITIONER

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
DARREN LISITZA
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263–3000

(Additional counsel on inside cover)

STEPHEN P.B. KRANZ
DOUGLAS L. LINDHOLM
DIANN L. SMITH
WILLIAM D. PELTZ
BOBBY L. BURGNER
J. HUGH MCKINNON
Council on State Taxation
122 C Street, NW, Suite 330
Washington, DC 20001
(202) 484–5215

JOAN DRESKIN
TIMM ABENDROTH
Interstate Natural Gas Association of America
10 G Street, NE
Washington, DC 20002
(202) 216–5900

JOHN P. LEBLANC
Louisiana Association of Business and Industry
P.O. Box 80258
Baton Rouge, LA 70898
(225) 928-5388

QUESTION PRESENTED

Whether Louisiana violated the interstate pipelines' right under the Due Process Clause to a "clear and certain remedy" for the payment of an unconstitutional tax when Louisiana refused to refund the tax unlawfully collected, and instead, in order to lessen or eliminate the refund, ordered a *de novo* re-valuation of taxpayers' property by 52 local assessors.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 5

LOUISIANA'S ATTEMPT TO CIRCUMVENT THE REMEDIAL OBLIGATION IMPOSED BY THE DUE PROCESS CLAUSE PRESENTS A SIGNIFICANT QUESTION THAT WARRANTS REVIEW BY THIS COURT. 5

A. The Decision Below Conflicts With Decisions of This Court and Other State Appellate Courts On A Recurring Question Of Substantial Importance – The Contours Of The States' Obligation To Provide Retroactive Relief For Unconstitutional Taxes 5

B. The Decision Below Subjects The Natural Gas Industry To Significant Economic Burdens That Threaten To Increase Energy Costs, Reduce Pipeline Investment, And Thwart Achievement Of The Nation's Energy Policy Goals 14

CONCLUSION 19

TABLE OF AUTHORITIES

Cases:

ANR Pipeline Co. v. Louisiana Tax Comm'n, 774 So.2d 1261 (La. 2000) 11

Aileen H. Char Life Interest v. *Maricopa County*, 93 P.3d 486 (Ariz. 2004) 13

Ala. Alcoholic Beverage Control Bd. v. Henri-Duval Winery, L.L.C., 890 So. 2d 70 (Al. 2003) 6

Allegheny Pittsburgh Coal Co. v. County Commission, 488 U.S. 336 (1989) 11

Am. Trucking Ass'ns v. Scheiner, 483 U.S. 266 (1987) 6

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) 6

Beskind v. Easley, 325 F.3d 506 (4th Cir. 2003) 6

Birth Hope Adoption Agency, Inc. v. Arizona Health Care Cost Containment Sys., 218 F.3d 1040 (9th Cir. 2000) 6

Boston Stock Exch. v. State Tax Comm., 429 U.S. 318 (1977) 6

Ceridian Corp. v. Franchise Tax Bd., 85 Cal. App. 4th 875 (2000) 13

Chapman v. Comm'r of Revenue, 651 N.W. 2d 825 (Minn. 2002) 6

Chicago Freight Car Leasing Co. v. *Limbach*, 584 NE..2d 690 (Oh. 1992) 12

City of Modesto v. National Med, Inc., 128 Cal. App. 4th 518 (2005) 13

Eddie Bauer, Inc. v. *Dir. of Revenue*, 70 S.W.3d 434 (Mo. 2002) 10, 13

D.D.I., Inc. v. State, 657 N.W.2d 228 (N.D. 2003) 6

TABLE OF AUTHORITIES — (Cont'd)

Fulton Corp. v. Faulkner, 516 U.S. 325 (1996) 6

General Motors Corp. v. City & County of San Francisco, 69 Cal. App. 4th 448 (1999) 10, 13

Georgia Railroad & Banking Co. v. Redwine, 342 U.S. 299 (1993) 12

Harper v. Virginia Dep't of Taxation, 509U.S. 86 (1993) 9

Maryland v. Louisiana, 451 U.S. 725 (1981) 6

McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940) 5

McKesson Corp. v. Div. of Alcoholic Beverages, 496 U.S. 18 (1990) ..... *passim*

Newsweek, Inc. v. Florida Dep't of Revenue, 522 U.S. 442 (1998) 3, 9, 13

North Supply Co. v. Director of Revenue, 29 S.W.3d 378 (Mo. 2000) 13

Northwood Constr. Co. v. Twp. Of Upper Moreland, 856 A.2d 789 (Penn. 2004) 6

Pendell v. *Dep't of Revenue*, 847 P.2d 846 (Ore. 1993) 12

PPG Indus. v. *Bd. of Finance and Revenue*, 790 A.2d 261 (Penn. 2001) 13

Reich v. Collins, 513 U.S. 106 (1994) ..... *passim*

Simon Aviation, Inc. v. Indiana Dep't of Revenue, 805 N.E. 2d 920 (Ind. Tax Ct. 2004) 6

S. Cent. Bell Tel. Co. v. *Alabama*, 526 U.S. 160 (1999) 6

S. Pac. Co. v. *Arizona*, 325 U.S. 761 (1945) 5

TABLE OF AUTHORITIES — (Cont'd)

State v. Carlson, 65 P.3d 851 (Al. 2003) 13

Stonebridge Life Ins. Co. v. Dep't of Revenue, 18 OTR 461 (Or. Tax Ct.2006) 13

Tenn. Gas Pipeline Co. v. Urbach, 750 N.E.2d 52 (N.Y. App. 2001) 7

In re the Appeal of CIG Field Servs. Co., 112 P.3d 138 (Kan. 2005) 6

Westinghouse Elec. Corp. v. Tully, 466 U.S. 388 (1984) 6

Williams v. Griffes, 686 A.2d 964, 966 Vt. 21 (Vt. 1996) 12

Yellow Freight Sys. vv. State, 585 N.W.2d 762 (Mich. 1998) 13

Statutes:

La. Const. art. VII, § 16 10

Rule 37.6 1

Natural Gas Act, 15 U.S.C. §§ 717-717(w) 16

Tax Injunction Act, 28 U.S.C. § 1341 8

Miscellaneous:

H. Sterling Burnett, *Shaping a Progressive Energy Policy: Natural Gas*, National Center for Policy Analysis Brief No. 434 (2003) 17

Pres. George W. Bush, Address at the Signing of the Energy Policy Act, Sandia National Laboratory, Albuquerque, NM (Aug. 8, 2005) 17

TABLE OF AUTHORITIES — (Cont'd)

John F. Coverdale, *Remedies for Unconstitutional State Taxes*, 32 CONN. L. REV. 73 (2000)..... 8, 12

David P. Currie, *The Constitution in the Supreme Court*, 37 CATH. U.L. REV. 39 (1987)..... 5

Richard H. Fallon, Jr. and Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1733 (1991) 5

Jerome R. Hellerstein & Walter Hellerstein, 2 *State Taxation*, ¶4.13 (2000) 6

Avoiding and Resolving Intergovernmental Conflicts with Interstate Natural Gas Facility Siting, Construction, and Maintenance. The INGAA Foundation (Mar., 2005), *available at* http://tinyurl.com/j7ojx..... 17

Energy Information Administration, Dep't of Energy, *Annual Energy Outlook 2006 with Projections 2030* 85-87 (Feb. 2006), available at http://www.eia.doe.gov/oiaf/aeo/pdy/0383(2006).pdf..... 15

Natural Gas on Public Lands: Hearings Before the Subcomm. on Energy and Mineral Resources at the H. Comm. on Resources, 107th Cong., 2nd Sess. (July 16, 2002)..... 17

Donald H. Regan, *The Supreme Court and State Protectionism*, 84 MICH. L. REV. 1091 (1986)..... 6

To Prevent Certain Discriminatory Taxation of Interstate Natural Gas Pipeline Property: Hearings Before the Subcomm. on Commercial and Administration Law of the H. Comm. on the Judiciary, 109thth Cong., 1stst Sess. 13 (Oct. 6, 2005)..... 14

INTEREST OF THE AMICI CURIAE

The Council On State Taxation ("COST") is a non-profit trade association whose members include 570 of the largest corporations in the United States.[1] COST's mission is to preserve and promote equitable and nondiscriminatory state and local taxation of multistate business entities. COST's members include companies from every segment of the economy; they conduct business in every State and between every State. These companies often bear the economic burden of state and local taxes that discriminate against interstate commerce. The Louisiana courts in this case devised a new method to impede companies burdened by such taxes from obtaining the refunds required by this Court's decisions interpreting the Due Process Clause. This decision, if permitted to stand, threatens to undermine the constitutional protections on which COST's members rely. COST therefore has a strong interest in the issue presented in this case

The Interstate Natural Gas Association of America ("INGAA") is a nonprofit trade organization whose members include virtually every major interstate natural gas transmission company operating in the United States. INGAA's members account for over 95% of all natural gas transported and sold for resale in interstate commerce, through a network of 180,000 miles of pipelines. State taxing authorities consistently find interstate pipelines and gas company property an irresistible target for taxes that impose disproportionate burdens on interstate and out-of-state business in violation of the Constitution. INGAA accordingly has a very substantial interest in the proper definition of the States' due process obli-

---

[1] Pursuant to Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for a party and that no person or entity, other than the *amicus curiae*, its members, and its counsel made a monetary contribution to its preparation and submission. The written consents of the parties to the filing of this brief have been filed with the clerk.

gation to provide a retroactive remedy when taxes are found to violate the Constitution.

The Louisiana Association of Business and Industry ("LABI") is a professional association of over 3,000 business and industry members which represents the business interests of its members before the Louisiana state legislature, regulatory boards, and courts. LABI's members have a substantial interest in ensuring that they receive the retroactive remedy required by the Due Process Clause.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves Louisiana's failure to abide by this Court's repeated admonition that due process requires States to provide a "clear and certain" remedy to victims of unconstitutional taxation. *McKesson Corp.* v. *Div. of Alcoholic Beverages*, 496 U.S. 18, 39 (1990); see also *Reich* v. *Collins*, 513 U.S. 106, 111 (1994); *Newsweek, Inc.* v. *Florida Dep't of Revenue*, 522 U.S. 442 (1998) (per curiam).

Louisiana imposed a facially discriminatory tax, assessing *intra*state pipelines at 15% of fair market value, and *inter*state pipelines at 25% of their fair market value. After the tax was invalidated – more than ten years after the first payment under protest – the Louisiana courts imposed a new limitation on petitioners' refund. They required onerous reassessments of petitioners' property instead of simply refunding payments in excess of the amount due under the lower tax rate applicable to intrastate pipeline property. Louisiana took the "clear and certain" remedy of a full refund, and replaced it with a series of burdensome, costly, and uncertain obstacles: reassessment of taxpayers' property by 52 local assessors.

The same motivation that drives States to impose taxes that are offensive to the Constitution – the ability to favor parochial interests by burdening out-of-state interests unrepresented in the state's political process – impels them to avoid providing their victims with clear and certain remedial relief. If this Court permits Louisiana's unjustified reassessment requirement to stand, other States likely will seize upon this approach to impermissibly restrict their refunds and institute their own, improper re-valuation schemes. In the face of costly re-valuation processes that do not result in full refunds, taxpayers will be less inclined to challenge discriminatory taxes in the first place. And having identified a new way to keep more of the proceeds of discriminatory taxes that ul-

timately are invalidated, States' enthusiasm for imposing discriminatory taxes will grow.

Other state courts have rejected procedural inventions indistinguishable from the one imposed by Louisiana, recognizing that this Court's decisions in *McKesson*, *Reich*, and *Newsweek* forbid the use of such "bait and switch" tactics with respect to remedies mandated by the Due Process Clause. The Court should grant review to eliminate these disparate approaches and reaffirm the importance of this fundamental constitutional protection.

Review is especially appropriate in this case, because the Louisiana court's decision increases the economic burden discriminatory taxation places on the natural gas industry, resulting in higher energy costs, reduced pipeline investment, and frustration of the nation's energy policy. Because natural gas companies have already made significant, immovable pipeline investments, States are irresistibly drawn to favoring their own pipelines and holding the interstate pipelines hostage with discriminatory taxes. This imposes an enormous economic burden on the natural gas industry, a burden that is borne ultimately by consumers who must pay both higher natural gas prices to heat their homes and higher prices for goods produced using natural gas. Knowing that States are free to withhold refunds of such discriminatory taxes makes further investment in pipelines unattractive, risking even higher gas prices and lower reliability of service, and threatening a critical aspect of our Nation's energy policy.

ARGUMENT

LOUISIANA'S ATTEMPT TO CIRCUMVENT THE REMEDIAL OBLIGATION IMPOSED BY THE DUE PROCESS CLAUSE PRESENTS A SIGNIFICANT QUESTION THAT WARRANTS REVIEW BY THIS COURT.

A. The Decision Below Conflicts With Decisions of This Court and Other State Appellate Courts On A Recurring Question Of Substantial Importance – The Contours Of The States' Obligation To Provide Retroactive Relief For Unconstitutional Taxes.

1. This Court has long recognized that the States have built-in incentives to enact laws that discriminate against out-of-state interests – including discriminatory taxes. See, *e.g.*, *S. Pac. Co.* v. *Arizona*, 325 U.S. 761, 767 n.2 (1945) ("to the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected"); *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33, 45-46 n.2 (1940) ("Lying back of these decisions is the recognized danger that, to the extent that the burden falls on economic interests without the state, it is not likely to be alleviated by those political restraints which are normally exerted on legislation where it affects adversely interests within the state.").

The federal Constitution's protections against this discrimination – the Equal Protection Clause, the Due Process Clause, and the Commerce Clause – thus counterbalance the State's "strong political motives to engage in discriminatory taxation." Richard H. Fallon, Jr. and Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1733, 1833 n.569 (1991); see also David P.

Currie, *The Constitution in the Supreme Court*, 37 CATH. U.L. REV. 39, 61 (1987) ("Since geographical outsiders have no vote, they are in special need of constitutional protection. * * * [T]his approach also helps to explain the Court's long-standing insistence that interstate commerce may not be subjected to discriminatory burdens."); Donald H. Regan, *The Supreme Court and State Protectionism*, 84 MICH. L. REV. 1091, 1092 (1986) (describing states' motives for protectionism, and this Court's concern with "preventing states from engaging in purposeful economic protectionism").

To ensure that these constitutional protections in fact fulfill their role, "the Court has scrutinized claims that a tax discriminates against interstate commerce with considerable vigilance." Jerome R. Hellerstein & Walter Hellerstein, 2 *State Taxation*, ¶4.13 (2000). And the long litany of decisions by this Court and other courts in recent years holding discriminatory state taxes unconstitutional confirms the continued importance of that vigilance. *E.g.*, *S. Cent. Bell Tel. Co.* v. *Alabama*, 526 U.S. 160 (1999); *Fulton Corp.* v. *Faulkner*, 516 U.S. 325 (1996); *McKesson*, 496 U.S. 18; *Am. Trucking Ass'ns* v. *Scheiner*, 483 U.S. 266 (1987); *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984); *Westinghouse Elec. Corp.* v. *Tully*, 466 U.S. 388 (1984); *Maryland* v. *Louisiana*, 451 U.S. 725 (1981); *Boston Stock Exch.* v. *State Tax Commn.*, 429 U.S. 318 (1977); *Beskind* v. *Easley*, 325 F.3d 506 (4th Cir. 2003); *Birth Hope Adoption Agency, Inc.* v. *Arizona Health Care Cost Containment Sys.*, 218 F.3d 1040 (9th Cir. 2000); *In re the Appeal of CIG Field Servs. Co.*, 112 P.3d 138 (Kan. 2005); *Northwood Constr. Co.* v. *Twp. Of Upper Moreland*, 856 A.2d 789 (Penn. 2004) (local tax); *Simon Aviation, Inc.* v. *Indiana Dep't of Revenue*, 805 N.E. 2d 920 (Ind. Tax Ct. 2004); *Ala. Alcoholic Beverage Control Bd.* v. *Henri-Duval Winery, L.L.C.*, 890 So. 2d 70 (Al. 2003); *D.D.I., Inc.* v. *State*, 657 N.W.2d 228 (N.D. 2003); *Chapman* v. *Comm'r of Revenue*, 651 N.W. 2d 825 (Minn. 2002);

Tenn. Gas Pipeline Co. v. *Urbach*, 750 N.E.2d 52 (N.Y. App. 2001).

Just as important as the substantive constitutional principles cabining the States' taxing authority are the remedial principles governing suits challenging unconstitutional exactions. This Court recognized in *McKesson* that, in order to enable the States to protect their "exceedingly strong interest in financial stability," States are not required to permit the taxpayer to litigate the validity of a tax before requiring payment. 496 U.S. at 37. But to satisfy due process, the Court unanimously concluded, a State must provide not just a post-payment opportunity to challenge the legality of the tax "but also a *'clear and certain remedy' for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one*." *Id.* at 39 (citation omitted; emphasis added).

Indeed, this remedy is essential to vindicate the substantive constitutional guarantees. If a State were not required to provide a full retroactive remedy, States would have a positive incentive to enact unlawful exactions because such measures would benefit the State's citizens by permanently exporting the economic burden of any discriminatory levies that the State managed to collect before the tax was invalidated and by permanently insulating in-state interests against an equivalent economic burden for the period the tax was in effect. Discriminatory taxes subsequently held unlawful would not simply be cost-free – they would confer a positive economic benefit to the States.

And the amounts of money involved can be substantial. Here, for example, one of the petitioners began paying taxes under protest in 1994, yet the decision holding the tax unlawful was not rendered until ***2005***. Pet. App. 7a n.4.

The obligation to provide an effective remedy is therefore critical to counterbalance the States' inherent incentives to adopt these illegal exactions. "Remedies for unconstitutional

taxes are needed not only because of the moral imperative of compensating taxpayers whose funds have been taken in violation of the Constitution, but also because of the instrumental need to deter states from exacting unconstitutional taxes in the future." John F. Coverdale, *Remedies for Unconstitutional State Taxes*, 32 CONN. L. REV. 73, 79 (2000).

An effective remedy also is essential to provide an incentive for taxpayers to challenge unlawfully discriminatory taxes in the first place. Mounting a legal challenge to a discriminatory tax is costly; taxpayers may litigate for years to obtain a final decision regarding the legality of a tax – virtually always in the often-not-hospitable courts of the State that imposed the levy (because of the limits on federal courts' jurisdiction imposed by the Tax Injunction Act, 28 U.S.C. § 1341). If at the end of this struggle a State may avoid providing effective retroactive relief, taxpayers will have a significantly reduced incentive to challenge unlawful taxes.

2. The Court has recognized the importance of an effective remedy – both as an independent requirement of due process and to promote vindication of the underlying constitutional protections against discrimination rights – through its decisions in *McKesson* and in *Reich*. In *McKesson*, the Court emphasized that when a State requires payment of a tax without providing the taxpayer with an opportunity to contest the constitutionality of the exaction, and the tax subsequently is adjudicated unlawful, the State has deprived the taxpayer of its property without due process, and therefore must "provide a 'clear and certain remedy' for the deprivation of tax moneys in an unconstitutional manner." 496 U.S. at 51. The Court analogized the payments of an unconstitutional tax to "real property unlawfully taken or criminal fines unlawfully imposed." *Id.* at 52 n.35.

Where a tax is invalid because it is "beyond the State's power to impose," due process requires the State to provide a refund. 496 U.S. at 39. Where the tax is unconstitutional

because it discriminates against interstate commerce, the State may choose to provide a full refund; it may cure the discrimination by refunding to the victim of the discrimination "the difference between the tax it paid and the tax it would have been assessed" under the standard applicable to the beneficiaries of the discrimination; or "to the extent consistent with other constitutional restrictions, the State may assess and collect back taxes from [the beneficiaries of the discrimination] * * *, calibrating the retroactive assessment to create in hindsight a nondiscriminatory scheme." *Id.* at 40. The State even may employ a combination of the latter two approaches "as long as the resultant tax actually assessed during the contested tax period reflects a scheme that does not discriminate against interstate commerce." *Id.* at 40-41; see also *Harper* v. *Virginia Dep't of Taxation*, 509 U.S. 86, 100-101 (1993) (summarizing *McKesson*'s remedy requirement).

The Court's decision in *Reich* demonstrates the importance of this requirement to provide a remedy, and the Court's recognition of the need to enforce it vigorously. The Georgia Supreme Court held in that case that a refund was not available under Georgia law because the taxpayer could have invoked a predeprivation remedy to challenge the unconstitutional levy. This Court reversed because state law had not appeared to make a predeprivation remedy available at the time the taxpayer paid the challenged tax. Although acknowledging a State's power to configure its remedial scheme, this Court said "what a State may not do * * * is to reconfigure its remedial scheme unfairly, in *mid-course* – to 'bait and switch' as some have described it," by retroactively limiting a state refund remedy. 513 U.S. at 111 (emphasis in original); see also *Newsweek*, 522 U.S. at 442 (per curiam) (applying *Reich* to overturn State's denial of a refund remedy).

In the wake of *McKesson* and *Reich* a number of state courts have refused to allow States to avoid their due process

remedial obligations by reconfiguring the postdeprivation remedy. For example, the Missouri Supreme Court held that requiring a parent and subsidiary to file dual returns in order to receive a refund did not cure a discriminatory rule against filing state consolidated income tax returns because the "dual filing option" was "an unknown and untested remedy" in that there was "no case or common practice in which it has been adopted or allowed" and therefore was "not a clear and certain remedy" under *McKesson*. *Eddie Bauer, Inc.* v. *Dir. of Revenue*, 70 S.W.3d 434, 438 (Mo. 2002).

A California court similarly rejected conditioning a refund on filing an additional application to describe in more detail the discriminatory nature of the taxation because it was impossible for the application to be timely for past tax years, and because "[i]t is unreasonable to require a taxpayer to produce documentation from 17 years ago that it was otherwise never required to maintain." *General Motors Corp.* v. *City & County of San Francisco*, 69 Cal. App. 4th 448, 455 (1999).

3. The decision below is starkly inconsistent both with this Court's decisions and with the approach taken by these other state courts. Rather than ordering a refund of "the difference between the tax [petitioners] paid and the tax [petitioners] would have been assessed" under the tax rate applicable to the favored class (*McKesson*, 496 U.S. at 40) – the conventional remedy in this type of situation – the court below ordered a *de novo* retroactive assessment of the fair market value of petitioners' interstate property during the relevant period. The *de novo* reassessment would use the method that applied to intrastate property, and then apply the lower tax rate to that new, inevitably higher assessed value.

Nothing in Louisiana law indicates that such a reassessment is a condition on the State's refund remedy. To the contrary, the limitations period for challenges to assessment of this property expired long ago, see La. Const. art. VII,

§ 16 (three-year statute of limitations), and neither petitioners nor respondent maintained a challenge to the assessments in the present litigation.

The court's ruling dramatically changes the refund remedy – from something that *was* "clear and certain" to something that is opaque and indefinite. Thus, as petitioners explain (Pet. 14), rather than obtaining a refund, they must participate in reappraisals in 52 different parishes for numerous individual tax years. These may produce over 1,500 separate hearings, followed by possible appeals to the Commission and then judicial review. See *ANR Pipeline Co.* v. *Louisiana Tax Comm'n*, 774 So.2d 1261, 1263 (La. 2000).

Moreover, because petitioners had no notice that such a reassessment might be required, they may not have preserved the relevant documentation. Certainly this process imposes very substantial costs and delays on petitioners – costs that will not be borne by the owners of the intrastate property who benefited under the unconstitutional tax scheme.

Finally, the reassessment cannot be defended on the ground that it is necessary to eliminate any unconstitutional discrimination. As the Court explained in *Allegheny Pittsburgh Coal Co.* v. *County Commission*, 488 U.S. 336, 343 (1989), "[t]hat two methods are used to assess property in the same class is, without more, of no constitutional moment." See also Pet. 20-21 (cases rejecting constitutional challenges based on use of different valuation methodologies). Petitioners here challenged only the discriminatory rates; the only logical cure for that constitutional violation was simply to equalize the rates.[2] Louisiana could attempt to enact a statute

---

[2] Of course, if a taxpayer demonstrated that two assessment methods as actually applied produced consistently different results, constitutional principles could well be implicated. Thus, if the assessment method applicable to one class of property produced predictably more favorable assessments than the method applied to another class, there could be an equal protection violation. And if

providing that, in the future, when a taxpayer seeks a refund on the ground that tax rates are unconstitutionally discriminatory – and the fair market value of the two classes of property is calculated using different methodologies – any refund based on a lower tax rate is conditioned on a reassessment of the property using the assessment methodology applicable to that tax rate. See *McKesson*, 496 U.S. at 45 (States may limit their obligation to pay refunds by "impos[ing] various procedural requirements on actions for postdeprivation relief" of discriminatory taxes).[3]

What Louisiana may not do, however, is to change its refund system retroactively to incorporate this reassessment requirement and thereby impose illegitimate and unfair burdens on a taxpayer's ability to vindicate its due process rights. That involves the precise burden that was rejected by the Missouri Supreme Court in *Eddie Bauer* and the California appellate court in *General Motors*. This Court should grant review to resolve that conflict.

4. The issue presented here is extremely important. Because States "will often be able to collect an unconstitutional

---

the disfavored class consisted of out-of-state entities, the disparity also could violate the Commerce Clause.

[3] Such a requirement would go beyond the procedural limitations that courts have thus far upheld, which involve much more even-handed and less burdensome requirements: limiting refunds to "those taxpayers paying under protest" (*McKesson* 496 U.S. at 45); short statutes of limitation for refunds (*ibid.*); paying refunds in installments (*ibid.*); and withholding interest on refunds (*e.g.*, *Williams* v. *Griffes*, 686 A.2d 964, 966 (Vt. 1996); *Pendell* v. *Dep't of Revenue*, 847 P.2d 846 (Ore. 1993); *Chicago Freight Car Leasing Co.* v. *Limbach*, 584 NE..2d 690 (Oh. 1992)). It therefore might well be invalid even if applied prospectively. Cf., *Georgia Railroad & Banking Co.* v. *Redwine*, 342 U.S. 299, 303 (1952).

tax during the lengthy period in which challenges to the tax are making their way through the courts," if the State "is free to hedge refund remedies with * * * many procedural hurdles," it will have to "refund only a small percentage of what it has collected" even if the tax ultimately is struck down. As a "consequence, states have little incentive to avoid enacting unconstitutional taxes." Coverdale, *Remedies*, *supra* at 80.

There already is a significant amount of litigation in state courts over the issue of retrospective remedies in cases involving unconstitutional taxes. Many of these cases involve *amici*'s members. See, *e.g.*, *Stonebridge Life Ins. Co.* v. *Dep't of Revenue*, 18 OTR 461 (Or. Tax Ct.2006); *City of Modesto* v. *National Med, Inc.*, 128 Cal. App. 4th 518 (2005) (local tax); *Aileen H. Char Life Interest* v. *Maricopa County*, 93 P.3d 486, 497-98 (Ariz. 2004); *State* v. *Carlson*, 65 P.3d 851, 871 (Al. 2003); *Eddie Bauer*, 70 S.W.3d 434; *PPG Indus.* v. *Bd. of Finance and Revenue*, 790 A.2d 261, 270 (Penn. 2001); *North Supply Co.* v. *Director of Revenue*, 29 S.W.3d 378 (Mo. 2000); *Ceridian Corp.* v. *Franchise Tax Bd.*, 85 Cal. App. 4th 875, 888-889 (2000); *General Motors Corp.*, 69 Cal. App. 4th at 455; *Yellow Freight Sys.* v. *State*, 585 N.W.2d 762, 766-67 (Mich. 1998).

If the decision below is permitted to stand, it is inevitable that other States will seize upon the approach taken by the court below to assert that they, too, are entitled to invent new case-specific restrictions on their refund remedy whenever a tax is found to be unconstitutional. Just as in *Reich* and in *Newsweek*, intervention by this Court is essential to address this important and frequently recurring issue.

B. The Decision Below Subjects The Natural Gas Industry To Significant Economic Burdens That Threaten To Increase Energy Costs, Reduce Pipeline Investment, And Thwart Achievement Of The Nation's Energy Policy Goals.

This case has especially important implications for the natural gas industry, because interstate pipelines – the principal mode of transportation for natural gas in interstate commerce – have been a frequent victim of discriminatory taxation schemes. The failure to return full refunds for taxes found to be discriminatory creates incentives for even more discrimination, and preserves their toll on energy prices, pipeline investment, and our nation's energy policy.

Once an interstate pipeline is built, and the pipeline owner has made a major investment in the State, "the pipeline owner is locked in and the bargaining power is in the hands of the state." *To Prevent Certain Discriminatory Taxation of Interstate Natural Gas Pipeline Property: Hearings Before the Subcomm. on Commercial and Administration Law of the H. Comm. on the Judiciary*, 109th Cong., 1st Sess. 13 (Oct. 6, 2005) (testimony of Veronique de Rugy, Research Fellow, American Enterprise Institute). As assets with significant upfront investment costs and very long lives, pipelines accordingly are a "prime target" for discriminatory taxation because "the States can effectively hold the pipeline investment hostage and extract a high tax payment." *Id.* at 12, 14. Because interstate pipeline companies typically are located out of state, and most of their employees therefore are not state residents, while their assets are permanently fixed in the taxing State, they "are high visibility targets for those States that think they can increase a tax and export it to their neighbor State." *Id.* at 28 (testimony of Laurence Garrett, Senior Counsel, El Paso Corporation Western Pipeline Group).

This discriminatory taxation imposes an enormous economic burden on the natural gas industry. Industry experts estimate that the "cumulative effect of these discriminatory tax policies is to increase the property tax bills of natural gas pipeline companies by more than 40 percent." *Id.* at 14 (de Rugy). In 2004, for example, natural gas pipeline companies paid $445 million in property tax, while they would have paid only $256 million if state tax laws treated pipeline companies in a nondiscriminatory fashion. *Ibid.* Providing full refunds through clear and certain means is a straightforward, indispensable way of reducing these economic burdens.

The effects of discriminatory taxation in Louisiana are multiplied because Louisiana plays a "pivotal role in the distribution of natural gas throughout the United States." *Id.* at 6 (testimony of Mark C. Schroeder, Vice President and General Counsel, CenterPoint Energy, Inc.'s Gas Pipeline Group). In 1999 alone, 19% of all natural gas in the United States was transported from or through Louisiana before reaching consumers. Therefore, "in 1999 Louisiana's discriminatory tax system affected approximately 19% of the national marketed [gas] production of the nation." *Id.* at 9. This importance will only increase as Louisiana hosts facilities for the importation of liquefied natural gas ("LNG") into the United States, which is projected to meet 24% of U.S. demand for natural gas by 2025. See Energy Information Administration, Dep't of Energy, *Annual Energy Outlook 2006 with Projections to 2030* 85-87 (Feb. 2006), *available at* http://www.eia.doe.gov/oiaf/aeo/pdf/0383(2006).pdf.

To the extent Louisiana is able to impose discriminatory taxes and avoid its obligation to provide a remedy, the burden on the national economy is significant. Of course, that burden will grow as other States attempt to use the same techniques to try to retain unlawful tax levies.

Discriminatory taxation of interstate pipelines does not just affect pipeline companies – it also raises consumers'

natural gas bills and, indeed, the costs of many other products, including electricity. Interstate pipeline companies are subject to cost of service regulation by the Federal Energy Regulatory Commission. Natural Gas Act, 15 U.S.C. §§ 717-717(w). When an interstate pipeline company seeks adjustment to its rates, taxes paid are included as an element of that cost of service. Thus, Louisiana's discriminatory taxation results in "higher costs for natural gas for consumers who must rely on interstate natural gas pipelines for the delivery of the natural gas." *Id.* at 7 (Schroeder).[4] And because the burden of higher gas prices falls on every consumer, it disproportionately injures poorer people. See *id.* at 32 (de Rugy).

Failure to provide remedial relief also reduces incentives to invest in the pipelines that our Nation needs to ensure that energy supplies will be available in the future, and that the natural gas system is robust enough to maintain reliable service during periods of stress. "State tax policies do enter into the decision making process in determining to proceed with major capital projects" to build and expand natural gas pipelines. *Id.* at 31 (Garrett). Discriminatory taxation increases pipelines' costs, reducing funds available for investment in new pipelines and maintenance of existing equipment. See *id.* at 14 (de Rugy). The prospect of discriminatory taxation also reduces pipeline owners' expected rate of return on new pipelines, further discouraging new investment in the United States in favor of investment in other locations. *Ibid.*

Lack of investment and delay in building new pipelines, and in maintaining existing pipelines, would impose enormous costs on the national economy. U.S. industry depends on natural gas for 27% of its primary energy consumption, and that reliance is expected to increase. *Id.* at 15 (de Rugy).

---

[4] Sixty-two percent of American homes use natural gas. See *id.*, at 12 (de Rugy).

Massive investment in pipelines, storage facilities, and liquefied natural gas terminals will be required to meet this demand. *Ibid.* Anything that reduces incentives to undertake this huge investment will impose costs – in the form of higher gas prices – on businesses and consumers. Thus, the cost of even a two-year delay in building natural gas infrastructure would cost U.S. natural gas consumers in excess of $200 billion by 2020.[5] Every consumer will pay higher pries for natural gas, electricity, and the goods produced using natural gas without the appropriate incentives to maintain and increase investment in pipelines.

Not surprisingly, therefore, expansion of the natural gas pipeline network is a key component of the Nation's energy policy. President Bush has stated that "expanding our domestic production of oil and natural gas" is vital to energy policy. Pres. George W. Bush, Address at the Signing of the Energy Policy Act, Sandia National Laboratory, Albuquerque, NM (Aug. 8, 2005)[6]; see also *Natural Gas on Public Lands: Hearings Before the Subcomm. on Energy and Mineral Resources at the H. Comm. on Resources*, 107th Cong., 2nd Sess. (July 16, 2002) (testimony of Rebecca W. Watson, Asst. Sec'y for Land & Minerals Mgmt., U.S. Dep't of the Interior) ("Natural gas is an important cornerstone" of the national energy policy); H. Sterling Burnett, *Shaping a Progressive Energy Policy: Natural Gas*, National Center for Policy Analysis Brief No. 434 (2003), at 1 (Lowering barriers to the expansion and modernization of natural gas pipelines is "[c]ritical to a sound national energy policy."). Weakening the protections against discriminatory taxation, as

---

[5] See *Avoiding and Resolving Intergovernmental Conflicts with Interstate Natural Gas Facility Siting, Construction, and Maintenance*. The INGAA Foundation (Mar., 2005), *available at* http://tinyurl.com/j7ojx.

[6] *Available at*, http://www.whitehouse.gov/news/releases/2005/08/20050808-6.html

the court below has done in this case, threatens to deter the very investment that our Nation needs to meet its energy challenges.

This Court should grant review in order to eliminate this unjustified burden on consumers, interstate commerce, and implementation of our national energy policy.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

STEPHEN P.B. KRANZ
DOUGLAS L. LINDHOLM
DIANN L. SMITH
WILLIAM D. PELTZ
BOBBY L. BURGNER
J. HUGH MCKINNON
Council on State Taxation
122 C Street, NW, Suite 330
Washington, DC 20001
(202) 484–5215

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
DARREN LISITZA
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263–3000

JOAN DRESKIN
TIMM ABENDROTH
Interstate Natural Gas Association of America
10 G Street, NE
Washington, DC 20002
(202) 216–5900

JOHN P. LEBLANC
Louisiana Association of Business and Industry
P.O. Box 80258
Baton Rouge, LA 70898
(225) 928-5388

JULY 2006